Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RAMON E. O'NEILL

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

and

JAMES BALDRIDGE; WILLIAM MANN; LARRY DUNN, individually and as representative of a class of persons similarly situated who are referred to as LPP CLAIMANTS.

Respondent.

On Petition For A Writ of Certiorari To The United States Court OF Appeals For The Third Circuit
VOL I

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Railway Labor Act establishes a "mandatory arbitral mechanism to handle disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'" *Norris*, 512 U.S. at 248 (citing 45 U.S.C. 153, First (1)).

The Court of Appeals for the Third Circuit, in a bankruptcy proceeding involving Continental Airlines, Inc.; James Baldridge; William Mann; and Larry Dunn (Respondents) acknowledge that Continental had not rejected a collective bargaining agreement that affords continuing mandatory arbitral rights to all former Eastern pilots. To reject a collective bargaining agreement, a debtor must first engage in collective bargaining with the authorized bargaining representative in an attempt to reach a mutually satisfactory modification of the agreement, and then apply for court approval after notice and a hearing. 11 U.S.C. § 1113.

The Court of Appeals for the Third Circuit noted on a previous decision precedential to this case that "Consistent with federal courts' role relating to minor disputes i.e., to protect the jurisdiction of the arbitration board, federal courts cannot inquire into the merits of an underlying dispute except to the extent necessary to determine its proper characterization as minor or major." *Chicago & Northwestern Transp.*, 829 F.2d at 1428. Nor may the courts decide what remedy is appropriate if the agreement is interpreted to require recovery of remedy *General Com of Adj., United Transp. Union v. CSX R.R.* 893 F.2D 584, 592-593 (3RD Cir. 1990) " [citing 522 U.S. 1114(1998) and 125 F.3d 120 (1997)] .

The Supreme Court decided that "Nor may a party circumvent the remedial powers of an adjustment board through methods of review outside the RLA" *Brotherhood Of Locomotive Engineers v. Louisville & Nashville R.R.*

373 U.S. 33, 38-39 (1963) ("*BLE*"). In *BLE* the Supreme Court based its holding on the principle that "the process of decision through the Adjustment Board cannot be challenged collaterally by methods of review not provided for in the statute."

James Baldridge; William Mann and Larry Dunn, not being the collective bargaining representative of, thus not having the power to settle the claims of the LPP Claimants nor any other Eastern pilot, were certified as a class, orchestrated by Class Counsel and Continental Airlines, Inc. in order to circumvent the arbitration. Continental's and the Class counsel's collusion illegally bypassed the arbitral forum with the foreknowledge that Continental had participated in an arbitration which merged only a portion of the Eastern Pilots Seniority List into Continental, illegally excluding Eastern pilots' representation therein. They then withheld that legally relevant information from the Bankruptcy Court and presented perjurious statements in the bankruptcy proceedings concerning the merger arbitration, constituting deception and fraud, and violating previous Supreme Court rulings.

The question presented is whether, knowing these circumstances, the Court of Appeals erred in holding that those asserted arbitrational rights and other rights contained within the collective bargaining agreement could be dismissed by non-authorized representatives of employees under a collective bargaining agreement, when both the Supreme Court and this very same Court of Appeals, itself, have affirmed the same collective bargaining agreement rights? *LPP Claimants v. Continental Airlines, Inc.*, 125 F.3d 120 (1997) 522 U.S. 1114 (1998).

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In The
Supreme Court of the United States
October Term, 2004

No._____

RAMON E. O'NEILL
Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

and

JAMES BALDRIDGE; WILLIAM MANN; LARRY DUNN; individually and as representative of a class of persons similarly situated who are referred to as LPP CLAIMANTS.
Respondents.

PETITION FOR A WRIT OF CERTIORARI

I, Ramon E. O'Neill, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit. The Court of Appeals previously held that Continental Airlines, Inc. ("Continental") did not reject the Eastern Pilots Collective Bargaining Agreement ("EPCBA") that affords me and the other Eastern pilots the right to arbitration and the arbitrational tribunal to resolve disputes under specified circumstances described within the EPCBA in accordance with the Railway Labor Act ("RLA"). Disregarding the decisions of this Court, the Court of Appeals for the Fifth Circuit decision and its own decisions, the Court of Appeals for the Third Circuit has reversed itself and has abrogated all rights contained within

the unrejected EPCBA. Thus, Continental obtained results that would only have been available had the EPCBA been timely and properly rejected during Continental's bankruptcy proceedings. Had the RLA (45 U.S.C.) been properly followed the results would have been different.

Accordingly, the Third Circuit Court of Appeals effectively nullified the RLA (45 U.S.C.) which imposes a mandatory arbitral mechanism to handle disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, and further nullified Bankruptcy Code 11 U.S.C. 1113, which imposes detailed restrictions on the ability of a company in bankruptcy to rid itself of obligations under a collective bargaining agreement ("CBA").

Review is warranted because the question presented raises a recurring issue of paramount importance regarding companies trying to circumvent the RLA utilizing the Bankruptcy Codes and the effect of non-rejection on continuing rights under a CBA after a bankruptcy proceeding. This Court's review is essential to resolve the conflicts between this decision and the decisions below: the decision of this Court in *LPP Claimants v. Continental Airlines, Inc.*, 125 F.3d 120, 522 U.S. 1114 (1998); the decision of this Court and the Court of Appeals for the Fifth Circuit in *Century Indem. Co. v. National Gypsum Co.* (*In the matter of Nat'l Gypsum Co.*), 208 F3d 498, *cert. denied*, 531 U.S. 871 (2000); the decision of the Court of Appeals for the Second Circuit, *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990); the decision of the Court of Appeals for the Third Circuit in, *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989); the jurisdiction of the arbitral tribunal; and the rights asserted under the RLA.

OPINIONS BELOW

The opinion of the United States Court of Appeals for

the Third Circuit is not reported, but is reprinted at pages 1a-8a of the Appendix to this Petition ("Pet. App."). The denial of the United States Court of Appeals for the Third Circuit, on petition for panel rehearing, Pet. App. 9a. The decision of the United States District Court for the District of Delaware is unpublished, but is reprinted at Pet. App. 11a- 18a. The denial of the United States District Court for the District of Delaware on motion for re-hearing en banc Pet. App.19a- 20a. The order from which this appeal originally is taken of the United States Bankruptcy Court for the District of Delaware is reported, and reprinted at Pet. App. 21a-25a. The order to compel from the United States Bankruptcy Court for the District of Delaware, is reprinted. Pet. App. 27a-29a.

An earlier decision from this Court and the United States Court of Appeals for the Third Circuit in this case is reported at 125 F.3d 120, 522 U.S. 1114 (1998); and is reprinted at Pet. App. 31a – 66a. The decision of the United States District Court for the District of Delaware from which that appeal was taken is unpublished, but is reprinted at Pet. App. 67a – 104a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 05, 2004. Pet. App. 1a-8a. I filed for a rehearing on March 23, 2004, which was denied by order dated April 23, 2004. Pet. App.9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

An extension of time within which to file a petition for a writ of certiorari was granted on July 12, 2004, which extended the time to September 20, 2004.

STATUTES INVOLVED

This case involves 45 U.S.C , the Railway Labor Act; 11 U.S.C. § 365 and § 1113 of the United States Bankruptcy Codes; which are set forth respectively at Pet. App. 105a – 158a, Pet. App. 159a – 178a and Pet. App. 179a – 183a

STATEMENT OF THE CASE

Background

This Court, as well as other courts following the interpretation of this Court, has concluded that the firm and longstanding policy under the RLA of deferring to the arbitration mechanism established by the RLA precludes this Court and any other court from deciding the merits of a dispute. For that reason, the courts have declined to make any findings. In this case, the debtor has effected a distress termination of the EPCBA utilizing a no-opt out class certification and totally ignoring Bankruptcy Code 1113 and the RLA.

The EPCBA is composed of 43 sections and 64 letters of agreement. Continental has only sought relief from one section of the agreement, the seniority integration section between the Eastern pilots and the Continental pilots. Continental obtained this relief without utilizing the Bankruptcy Code 1113 procedure. Instead, Continental presented to the bankruptcy court and subsequent courts the argument that the relief from seniority integration is warranted because it was a requirement from the investors in order to invest in the New Continental and emerge from bankruptcy. It was part of the confirmation plan. The merger and seniority rights contained in the EPCBA are part of an on-going arbitration. The other 42 sections and the other 63 letters of agreement contained in the EPCBA have never been addressed or rejected in the bankruptcy proceedings. In light of this,

Continental orchestrated a class action, and with the help of class counsel, James Baldridge, William Mann, and Larry Dunn, a settlement agreement was put forward that, if affirmed by this Court, will totally nullify the RLA and Bankruptcy Code 1113.

In early 1986, Eastern and ALPA entered into a CBA, governed by the RLA, 45 U.S.C. 151 *et seq. In re Ionosphere Clubs, Inc.,* 105B.R. 761, 762 (Bankr. S.D.N.Y. 1989), that included Labor Protective Provisions ("LPP"). Under these LPPs, " Eastern pilots secured protection of their seniority rights in the event of a merger between Eastern and another airline carrier" by requiring the "integration of Eastern's pilots seniority list with the merging carrier's pilot seniority list." *Id.* Less than twenty-four hours after the parties entered into the EPCBA, Texas Air Corporation, Parent Corporation of Continental Airlines, Inc. ("Continental"), acquired Eastern.

ALPA subsequently concluded that Continental and Eastern had effectively merged, as defined by the LPPs. When Eastern disagreed with this conclusion, ALPA initiated arbitration before the System Board of Adjustments ("SBA"), the arbitral panel responsible under the RLA for adjudicating disputes under the agreement. *Eastern Air Lines, Inc. v. ALPA,* 861 F.2d 1546, 1549 (11th Cir. 1988). In response, Eastern sought a declaratory judgment that there was no collective bargaining agreement between the parties, on the ground, *inter alia,* that the parties disagreed about the meaning of several provisions of the purported EPCBA, including the LPPs. *Id.* The Court of Appeals for the Eleventh Circuit ultimately ruled in ALPA's favor, holding that EPCBA was in effect, and that the parties were obligated to arbitrate their disputes regarding the meaning of the ambiguous provisions. *Id.* 1550, 1555.

The arbitration previously initiated by ALPA then proceeded, with the SBA addressing a number of preliminary questions regarding the meaning of the LPPs.

In an opinion authored by the neutral referee, Professor Frank Elkouri, the SBA construed the Agreement to incorporate LPPs that provide the Eastern pilots with the right

to seniority integration upon the occurrence of certain defined events, including a merger Pet. App.185a-216a (quoting full text of provisions held to be incorporated). The arbitrator also interpreted the LPPs under the EPCBA to create a continuing obligation:

[T]he right of pilots to know the general scope of their contractual LPP protection, and their right to insist that the Company likewise know, and their right to insist that the Company not deny the existence or general scope of the contractual LPP protection, are all continuing rights: each and every day that these rights are denied to the pilots by the Company, their right to protest by grievances arises anew." Id. at 7 (emphasis added) **Pet. App 193a.**

The Elkouri / SBA decision became part of the EPCBA. It includes Sections 2(a), 3 and 13 of the Allegheny-Mohawk LPP's as cited in the award Pet. App. 216a.

This decision was never appealed at the respective District Court by Eastern nor by Continental. Neither Eastern nor Continental asked the bankruptcy court for relief from this arbitration award under Bankruptcy Code § 1113.

Whether a merger had in fact occurred was not before this arbitrator and/or the SBA, and before the parties could proceed to the next step, Eastern and its affiliates filed for bankruptcy in the Southern District of New York. *See In re Ionosphere Clubs, Inc.*, 105 B.R. at 763. Citing the automatic stay in section 362 of the Bankruptcy Codes, Eastern refused to submit to further arbitration, and the Bankruptcy Court denied ALPA's request for relief from the stay. *Id.* at 765.

On appeal, the District Court reversed, *In re Ionosphere Clubs, Inc.*, 114 B.R. at 381, and the Court of Appeals for the Second Circuit affirmed, 922 F.2d 984 (2d Cir. 1990), holding that the application of the automatic stay to allow Eastern to avoid its obligation to arbitrate the LPP dispute was impermissible in the "absence of the debtor's compliance with the requirements of section 1113 [of the Bankruptcy Code]".

In April 1991, ALPA and Eastern proceeded to arbitration before arbitrator Richard Kasher. Continental was

invited to participate in the arbitration. Pet. App. 217a-235a. By this time, Continental had filed for bankruptcy. Despite the earlier Second Circuit decision in Eastern's bankruptcy, Continental refused to arbitrate, repeating Eastern's argument that the arbitration was stayed under section 362 of the Bankruptcy Code. Arbitrator Kasher disagreed, ruling in August 1992, that he had jurisdiction over the LPP dispute and could render a determination of the appropriate remedies; relying on the Second Circuit's decision in Eastern's bankruptcy, he rejected Continental's suggestion that the arbitration was barred by the automatic stay. Pet. App. 231a-235a. He scheduled hearings on the merits of the LPPs dispute to commence in February of 1993.

In light of the pending Kasher Arbitration, Continental protected some selected Eastern pilots, listed on the Eastern pilots seniority list. **By doing this, Continental unilaterally created a *de facto* merger and determined where in the Continental seniority list these selected Eastern pilots would be placed, without informing the bankruptcy court, as required by the Bankruptcy Code Rule 6006 and 9014.** Pet. App. 367a-369a

Continental violated 29 CFR 10-1204.1 and 1204.2 when it unilaterally changed the seniority and LPP provisions of the CBA. Code of Federal Rules 29 CFR 10-1204.1 and 1204.2 states:

§ 1204.1 Making and maintaining contracts.

"It is the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain contracts covering rates of pay, rules, and working conditions."

§ 1204.2 Arbitrary changing of contracts.

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of the Railway Labor Act."

On August 13, 1991, Arbitrator Ross issued an award, *In the Matter of the Pilot Seniority Integration Arbitration among People Express Pilot Merger Committee and Continental Pilot Merger Committee and Frontier Pilot Merger Committee and Continental Airlines, Inc* , ("Ross arbitration") Pet. App. 237a-345a, citing his reasons for overruling Continental's unilateral placement of those selected Eastern pilots, and reshuffling all pilots contained within the Continental Seniority list including the selected Eastern pilots.

"Because the CAL pilots hired after April 1987 were hired for the benefit of Eastern and not Continental, it would be unfair to place them ahead of the FMRs." Pet. App. 284a.

"In this regard, it would be particularly inequitable to elevate the pilots hired after April 1987 as potential strike replacements for Eastern, as they were surplus to Continental's operational needs." Pet. App. 289a.

Continental had filed for bankruptcy protection on December 10, 1990. Continental did not seek protection from the Ross arbitration through the bankruptcy process.

Nowhere in the bankruptcy process did Continental:
1. Notify the bankruptcy court that it had unilaterally merged some Eastern pilots into Continental Pilots Master Seniority list and assumed the EPCBA.
2. Notify the bankruptcy court that it had unilaterally determined the seniority integration of the Eastern pilots.
3. Seek relief under 11 U.S.C. § 1113 to exclude the remaining Eastern pilots from the Ross arbitration process.

Instead Continental in September of 1993 sought relief from the EPCBA LPPs in bankruptcy court as part of the Confirmation Plan. In doing so Continental violated *45 U.S.C. (RLA) and 11 U.S.C. 1129 a (3)* .

11U.S.C. 1129 a(3) states:
(3) The plan has been proposed in good faith and not by any means forbidden by law.

On December 22, 1992, Continental filed in Bankruptcy Court a motion seeking relief from the Eastern pilots' arbitration, even when it was aware that some Eastern pilots in Eastern Air Lines seniority list had been unilaterally merged into Continental's seniority list. Under the *RLA* and as noted on *29 CFR 10-1204.1 and 1204.2*, Continental was fully aware that once **one** Eastern pilot was merged it was obligated to merge the entire Eastern Pilots' seniority list.

Continental from 1989 to 1993 mounted a heavy campaign against organized labor. Being fully aware that a merger which included Eastern pilots would have brought organized labor (ALPA) into the Continental property, Continental decided to avoid arbitration with the Eastern pilots at all cost. As noted in the Ross arbitration Continental only agreed to merge non- unionized pilots, Pet. App.248a, 301a and 336a, a clear violation of *29 CFR 1205.2*

§ 1205.2 Employees' Bill of Rights.

"The provisions of the third, fourth, and fifth paragraphs of section 2 are by law made a part of the contract of employment between the carrier and each employee and shall be binding upon the parties regardless of any other express or implied agreements between them. Under these provisions the employees are guaranteed the right to organize without interference of management, the right to determine who shall represent them, and the right to bargain collectively through such representatives. This section makes it unlawful for any carrier to require any person seeking employment to sign any contract promising to join or not to join a labor organization. Violation of the foregoing provisions is a misdemeanor under the law and subjects the offender to punishment."

Another violation of the *RLA* and *29 CFR 10-1204.1 and 1204.2, which* the courts have conveniently ignored occurred when Continental decided to dispose of some Eastern international routes without transferring Easter pilots with those routes as required by the LPPs of the unrejected EPCBA. It is Eastern pilots' rights to be transferred with those international routes. As reflected on Pet. App. 350a, Continental, denied rights accorded to me by the Department of Transportation and the LPPs . This was done to obtain higher values for these assets by eliminating labor requirements specified by the Labor Protective Provisions contain in *Public Law 85-726 Title IV – AIR CARRIER ECONOMIC REGULATION – Sections 401 K 1 through 5*, Pet. App. 361a-362a. Compliance with Labor Legislation clearly mandates the protection of pilots with the transfer of international routes.

The First Bankruptcy Court Decision

In April of 1993, notwithstanding arbitrator Kasher's August 1992 ruling (and the decision of the Court of Appeals for the Second Circuit in the Eastern bankruptcy case), the Delaware Bankruptcy Court ruled that the Kasher arbitration was prohibited by the automatic stay. The court also incorporated by reference ruling from February 1993, that the equitable remedy of seniority integration was a "claim" within the meaning of the Bankruptcy Code, and could be satisfied by monetary awards in lieu of specific performance, and that this claim was not entitled to administrative expense treatment.

The First District Court Decision

After appealing the Bankruptcy Court's orders to the District Court, ALPA settled with Continental, but the individual claimants known as the LPP Claimants, listed individually, continued the appeal. On that appeal, the District Court made several rulings. It dismissed as moot the pilots' appeal from that portion of the Bankruptcy Court's decision

denying administrative expense status to the claims, and it affirmed the Bankruptcy Court's ruling that the claims for equitable relief could be converted to money damages. However, it also vacated the injunction against the arbitration on the grounds that the Bankruptcy Court lacked jurisdiction to issue it. The District Court made these rulings ignorant of the facts that some members of the class of claimants had been surreptitiously merged into the Continental seniority list with a full specific performance award.

The First Court of Appeals Decision

Continental, the LPP Claimants listed individually, including myself and another group of pilots represented by separate counsel, the Eastern Pilots Merger Committee ("EPMC"), also listed individually, appealed to the Court of Appeals for the Third Circuit. The Court of Appeals affirmed 125 F.3d 120, 522 U.S. 1114 (1998); *("Continental I").*

The Court of Appeals ruled that "the bankruptcy court was well within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claim[s]." The Court of Appeals also affirmed the decisions of the lower courts that the pilots' seniority rights could be converted to bankruptcy claims for money damages. Significantly, however, the Court "limited" its holding to "how the claims should be treated in bankruptcy" and "We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LPP dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, we hold that any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment.". *Id.* 136-38

The Court of Appeals also ruled "Accordingly, we conclude that Continental is bound by its prior representations that it has a duty to arbitrate the LPP dispute." *Id.* 136-38

The Second Bankruptcy Court Decision

After the decision in *Continental I,* a dispute arose over the scope of the arbitration to be conducted as a result of this decision. Continental asserted that the Eastern pilots were entitled to arbitrate *only* the existence and amount of bankruptcy claims, i.e., that they had no continuing rights subsequent to entry of the Confirmation Order.

Continental took the position that any seniority integration right acknowledged in arbitration would be subject to the limitations of Bankruptcy Code section 502(b)(7), 11 U.S.C. § 502(b)(7), and would thus be limited to one year's back pay based on Continental's pay structure as of January 1991. An attorney for the LPP Claimants agreed to bring a declaratory judgment action in the Bankruptcy Court to determine whether § 502(b)(7) applied, and requested class certification for the action. The LPP claimants had hired Myles Tralins as the attorney, to exclusively pursue the rights of arbitration as contained in the EPCBA. Mr Tralins was not hired for the purposes of any settlement or class certification.

Disregarding the lack of legal standing under the RLA and utilizing the funds raised by the LPP claimants exclusively to pursue arbitration, James Baldridge, William Mann, Larry Dunn, attorney, Tralins, and Continental orchestrated a class certified by the Bankruptcy Court under Fed. R. Civ. P. 23(b)(2). No other LPP claimant besides James Baldridge, William Mann, and Larry Dunn were notified of the class certification and its implications.

Lacking notification of the settlement agreement and its implications, I had petitioned the National Mediation Board ("NMB") to recognize my rights and let me proceed to arbitration. The NMB granted the request to exercise my rights to arbitration on January 29, 2002. Pet. App. 365a.

On January 31, 2002, together with 54 class members, I objected to the settlement agreement because our rights to

settle this dispute under 45 U.S.C. arbitration were being settled on our behalf without our consent.

The Bankruptcy Court approved the class settlement, finding it to be "in all respects, fair, reasonable and adequate to the Class", despite the fact that I had proven inequitable treatment within the Class at the hearing. The Bankruptcy Court and Continental acknowledged at the hearing that members of the same Class were being afforded positions as pilots in Continental Airlines with full specific performance disregarding all previous court rulings. In the RLA extensive history of arbitration, no carrier has ever been allowed to merge just some selected pilots of the acquired carrier system seniority list without addressing the entire seniority list.

The Bankruptcy Court hearing of January 31, 2002 disregarded Norris, 512 U.S. at 248 (citing 45 U.S.C. 153, First (1) ["mandatory arbitral mechanism to handle disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."], and approved the settlement. Also discussed was how the settlement agreement affected my rights against third parties not protected by the Bankruptcy Confirmation Order.

The Third Bankruptcy Court Decision

On March 6, 2002, Continental filed a motion to compel me to comply with the settlement order of January 31, 2002. The court, overstepping its boundaries, issued again an injunction against the arbitration under the pretence of a class action settlement.

The Second District Court Decision

A total of 54 Eastern pilots appealed the order of the Bankruptcy Court. The District Court entered an order on April 1, 2003. without addressing the merits of the appeal, it ruled upon a motion of mootness submitted by Continental. Affirming the Bankruptcy Court's settlement order, it found

the Settlement Order appeal moot, and granted the appellees' motion.

The Second Court of Appeals Decision

I appealed and argued that: 1. The lower courts had misunderstood the decision on *Continental I.* 2. The Settlement Order violates the order contained in *Continental I.* 3. I petitioned the court to revisit *Continental I* based on the new evidence that Eastern pilots had been merged into Continental's pilot system seniority list (as reflected in the Ross arbitration).

The Court of Appeals also noted in its decision that: "The Bankruptcy Court noted that the Ross arbitration decision dealt with former People Express pilots; and, while **they may have been Eastern pilots at some point,** the arbitration award was based on the People Express merger." So, again, another court recognized the evidence establishing the existence of some Eastern pilots in Continental's pilot seniority list and their participation in an arbitration in which Eastern pilots were supposedly not entitled to participate, but failed to recognize the violation of the RLA, and thus, the violation of Bankruptcy Law. **No Eastern pilot included in the certified class could be in the November 1990 Eastern's Pilot Seniority list and legally be in the People Express Pilot Seniority list at the same time, especially when People Express had shutdown operation on December 29, 1986.**

Continental I had already limited the class members' relief to money damages. The Court of Appeals, as well as the lower courts overlooked the inequities of equitable relief within the Class.

The Court of Appeals in this March 5, 2004 decision states: "Finally, O'Neill argues that his right to arbitration survives the settlement. We disagree. If O'Neill were to return to arbitration, the arbitrator might recognize his right to seniority integration under the LPPs. However, any amount award by the arbitrator would be subject to § 502(b)(7)'s cap

and would be less than he can recover under the settlement. Any relief awarded by the arbitrator would be meaningless; thus, O'Neill's right to arbitration has been mooted by the settlement." Pet. App. 8a. **This is a complete reversal from *Continental I*, and *Hays and Co. V. Merrill Lynch*, 885 F.2d 1149, 1158 (3d Cir.1989) and an absolutely egregious violation of the Railway Labor Act.**

The Third Court of Appeals Decision

On March 23, 2004, I petitioned a rehearing from the Court of Appeals for the Third Circuit. I included a motion of compliance by all parties, based on *Continental I* and the decision rendered by the court on March 5, 2004. To my amazement, the Court of Appeals for the Third District would not rule on the motion of compliance, expressly contradicting the March 5, 2004 ruling. Again, the court changed its position and denied a rehearing on April 23, 2004.

The Fourth Bankruptcy Court Decision

Strangely, the Delaware Bankruptcy Court, the same court which is enjoining me and other Eastern pilots from proceeding to arbitration, issued a contrary decision on December 17, 2003, to other individually represented former Eastern pilots preserving their individual right to arbitration under *Continental I.* Pet. App. 376a – 378a.

Following are excerpt of the opinion, Pages 7 through 10 of the opinion:

"We disagree. We conclude that the Respondents' request for arbitration does not violate the Confirmation Order or any other order entered in this case. In Continental I, the Third Circuit upheld the District Court's dissolution of the injunction of arbitration. Continental I, 125 F.3d at 136-37. The Court concluded that section 1113 of the Bankruptcy Code renders the injunction invalid because Continental failed to reject the CBA. Id. The intent of section 1113 is to preclude

debtors from unilaterally terminating a collective bargaining agreement without following its strict mandate. Id. at 137. The Court consequently held that the discharge injunction could not apply to the arbitration because enforcing it would have the effect of permitting Continental to escape its duty to arbitrate under the CBA. *Id* Accordingly, we must follow the law of the case and conclude that the discharge injunction does not enjoin the Respondents' attempt to resume the arbitration under the CBA." *Id.* Pet. App. 376a-377a

"Again, we find that we are bound by the decision of the Third Circuit in Continental I. In concluding that the right to seniority integration gave rise to monetary damages, the Third Circuit determined that the claims were dischargeable in bankruptcy. Continental I, 125 F.3d at 136. The Third Circuit, however, limited its holdings to how the claims would be treated in Continental's bankruptcy. Id. The Court did not determine if an award was warranted, whether an award should be granted or who would be liable should an arbitration award be granted. Id. At the time it upheld the right to arbitrate under the CBA, the Third Circuit knew that any award the arbitrator may enter against Continental was discharged by the Confirmation Order. It nonetheless concluded that the arbitration should be permitted to proceed. The facts are no different now. Thus, we cannot enjoin the arbitration." Pet. App. 377a-378a.

The Eastern District of Virginia Bankruptcy Court Decision

In re US Airways Group, Inc. et al Case No. 02-83984-SSM, (Pet. App. 381a-408a) the court had to address the issues of collective bargaining agreement under the RLA and rejection of these agreements through the bankruptcy process. Citing *Continental I* and *Ionosphere I* 922 F.2d 984 (2d Cir. 1990), case law for the case in front of this Court, concludes that the "firm and longstanding policy under the RLA of deferring to the arbitration mechanism established by the Act

precluded the court in reaching any merits on the dispute."

The conclusion of this aforementioned case sums it up. The similarities with our case are identical, but the court for the Fourth Circuit interprets *Continental I* differently than the Third Circuit Court.

"In summary, the court finds that the financial requirements for a distress termination have been met, and the court has approved such termination provide the termination does not violate terms of the collective bargaining agreement between the debtors and ALPA. The court declines to make a ruling on that issue, and that dispute will have to be resolve under the arbitration mechanism established by the collective bargaining agreement pursuant to the Railway Labor Act." Pet. App 407a-408a.

SUMMARY OF ARGUMENT

The Railway Labor Act ("RLA"), as construed by this Court, permits lower courts **neither** to interpret disputed contract terms **nor** to set aside adjustment board awards except on the narrow base prescribed in the RLA. Absent rejection, the contract must be given effect through the adjustment board mechanism.

This case involves **three** adjustment board / arbitrator awards. The first, Elkouri award reaffirmed that the LPPs were applicable to the EPCBA. The second, arbitrator Kasher opinion rendered that the arbitrational tribunal has sole jurisdiction over the issues. The third, rendered by arbitrator Ross, recognized the merger of Eastern pilots in the Continental seniority list. These arbitration's were not rejected by either utilizing 9 U.S.C. (Arbitrations), 45 U.S.C. § 159 Fifth & Six (The Railway Labor Act) or 11 U.S.C. § 1113 (Bankruptcy), **therefore, the arbitration awards are still in effect at this time.**

The Court of Appeals decision from which this appeal is taken, conflicts with well established precedents of this

Court and the decision in *Continental I.* Those precedents mandate exclusive adjustment board jurisdiction over disputed terms of labor agreements in industries covered by the RLA disputes growing "out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252-53 (1994); *Consol. Rail Corp. v. y. Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) ("Conrail"). This decision erroneously approved court resolution rather than adjustment board resolution of disputed remedial terms of the CBA.

The Court of Appeals in *Continental I*, concluded "that Continental is bound by its prior representations that it has a duty to arbitrate the LPP dispute" In addition, during the *Continental I* proceedings the court **was unaware of the essential fact that Eastern pilots in the Eastern Air Lines Seniority List had been merged into Continental Pilots Seniority List.**

The Court of Appeals in this last decision acknowledged that "the Bankruptcy Court noted that the Ross arbitration decision dealt with former Peoples Express pilots; and, while they may have been Eastern pilots at some point, the arbitration award was based on the People Express merger." But they erred by not addressing the proviso contained within the RLA that no pilot from an acquired carrier, (in this case Eastern, since some of the pilots were on the Eastern seniority list), could be merged into the seniority list of the acquiring carrier without addressing the entire pilots seniority list of the acquired carrier. The Court also erred by not addressing equitable relief within the Class. The Supreme Court has previously ruled that equitable relief within the Class, had to be addressed in light of new findings which clearly demonstrated inequities within the class. *Protective Committee v. Anderson* 390 U.S. 414 (1968), Pet. App. 409a-448a.

Also, the courts have permitted the actions of three individuals, notwithstanding evidence that they are not the collective bargaining representative of the Eastern Air Line

pilots, to orchestrate, along with Continental, the means to circumvent the obligations contained within EPCBA, i.e., to arbitrate. The actions of these three and Continental have effectively nullified the RLA, and have opened new means for carriers to avoid the obligations contained within CBAs. Carriers in the future could use a class certification settlement in lieu of RLA arbitration.

By creating a split within its own judicial circuit and a split with other judicial circuits over bankruptcy law, the RLA and violating this Court's precedents on the appropriate role of courts in interpreting labor agreements under the RLA, this decision undermines the RLA, and the unrejected EPCBA.

ARGUMENT

The petitioner is respectfully urging this Court to review the judgment of the Court of Appeals for the reasons set forth in this Petition for a Writ of Certiorari: a) to resolve the conflict of jurisdiction between the RLA and Bankruptcy Code and b) to resolve the judicial circuit conflict over the effect of an employer's failure to reject a collective bargaining agreement under section 1113 of the Bankruptcy Code.

I emphasize that the decisions of the lower courts create effective nullifications of 11 U.S.C. § 1113 and also violates this Court's well-established precedents under the RLA. An employer utilizing methods not described under the mandatory mechanism of the RLA could now circumvent the resolution of disputes; a process this Court has ruled on many occasions must be followed.

Collective bargaining representative (unions) will be forced to seek new and expanded protections against the negative effects brought about by this decision, not limited to new legislation, unless this Court acts and reminds the lower courts of their boundaries and jurisdiction.

I. THE DECISION OF THE COURT OF APPEALS NOT ONLY REVERSES *CONTINENTAL I*, BUT ALSO VIOLATES WELL ESTABLISHED PRECEDENTS OF THIS COURT AND THE RAILWAY LABOR ACT.

Under the Railway Labor Act, interpretative disputes over labor agreements are subject to exclusive adjustment board jurisdiction, and resulting awards may be set aside only on statutorily prescribed grounds.

The RLA establishes a comprehensive framework for resolving labor disputes in the rail and airline industries. Pursuant to that scheme, the statute divides contractual disputes into two classes. The first class, concern disputes over the creation of new collective bargaining agreements or attempts to change the terms of the existing agreements. This is the class that addresses this case. The RLA establishes a "mandatory arbitral mechanism to handle disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'" *Norris*, 512 U.S. at 248 (citing 45 U.S.C. § 153, First (i)). In the airline industry, the Act mandates that carrier's and employee's representatives establish "board of adjustment" to arbitrate such disputes.45 U.S.C. § 184. This Court termed such disputes "minor disputes." *Elgin*, 325 U.S. at 723

Adjustment board jurisdiction to resolve minor disputes is compulsory, binding, and exclusive. *Conrail,*491 U.S. 303-04 & n.4; *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322-25 (1972) ("the notion that the grievance and arbitration procedures provided minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law"). The reasons for this rule are well established and have been articulated repeatedly by this Court. First, of course, the statute demands it. 491 U.S. 303-04 & n.4; 406 U.S. 322-25. But in addition, this Court has recognized the special competence of industry arbitrators to resolve such disputes

based on custom and practice in the industry – and in particular to formulate remedies:

"The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards....[T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level - disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements."

*****

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."

In re United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960). There can be no question that the exclusive jurisdiction of RLA adjustment boards extends not just to the substantive rights under a labor agreement, but, also, to nonfrivolous disputes over agreed remedies for violation of those rights as well. A core holding of *Conrail* was that the burden on the party seeking to invoke adjustment board jurisdiction is "light." If the party "asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Where, in contrast, the [party's] claims are frivolous or obviously insubstantial, the dispute is major." *Conrail*, 491 U.S. at 307. By making a nonfrivolous assertion to right a particular remedy under a labor agreement, a party meets its burden to vest the adjustment board with jurisdiction to decide the issue.

Thus, for instance, in *General Committee of Adjustment v. CSX Railroad*, 893 F.2d 584 (3rd Cir.1990), where a railroad

sought to sell a line without bargaining over its effects, the court dismissed a union complaint seeking to enjoin the sale by noting that [t]he merits of [the] issue[of the impact on union jobs] will be before the Adjustment Board as will the question of what remedy may be appropriate if it decides for the Union." *Id* at 592. Citing *Conrail,* the court declined to retain jurisdiction pending arbitration, noting that "[i]n minor disputes, the Board has full authority to resolve the matter and can grant a complete and adequate remedy to the prevailing party." *Id.* at 593.

Buttressing the exclusive jurisdiction of adjustment boards to decide interpretive disputes in the first instance, judicial review of adjustment board decisions is "among the narrowest known to law." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91, 93 (1979) (quoting the circuit court below, and noting that "[w]e have time and again emphasized" that the statutory language specifying three "limited" and "specific" grounds for review "means just what it says").

The RLA subsections 3, First (p) and (q) permit federal courts to set aside adjustment board decisions on only three bases: (1) failure of the Adjustment Board to comply with the requirements of the RLA; (2) failure of the Adjustment Board to conform or confine itself to matters within the scope of its jurisdiction; or (3) fraud or corruption. 45 U.S.C. 153, First (p) and (q).

Nor may a party circumvent the remedial powers of an adjustment board through methods of review outside the RLA. *Brotherhood of Locomotive Engineers v. Louisville & Nashville.*, 373 U.S. 33, 38-39 (1963) ("BLE"). In *BLE,* the National Railroad Adjustment Board refused the parties' request to clarify the scope of a remedial award mandating "pay for time lost as the rule is construed on the property." *Id* at 34. The carrier sued for injunctive relief when the union threatened a strike to enforce its interpretation of the disputed term. This Court affirmed the lower courts' judgment that the union was limited to the judicial enforcement procedure

established in section 3, First (p) of the RLA, 45 U.S.C. 153, First (p), and could not strike to enforce its interpretation. *Id* at 35-36. This Court based its holding on the principle that "the process of decision through the Adjustment Board cannot be challenged collaterally by methods of review not provided for in the statute." *Id.* at 38.

The Court of Appeals, (Pet. App. 211a) in *Continental I*, acting outside its jurisdiction, edited Section 13 (a) of the Elkouri award as follows by deleting the following underlined selection:

"Section 13(a): In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. **The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees or group or groups of employees. *The decision of the arbitrator shall be final and binding on the parties.*** **(Emphasis added)**

This set a precedent allowing the courts to be able to abrogate unilaterally any CBA under the RLA. If this precedent is allowed to stand, this Court will have allowed the courts and the debtor to abrogate the CBA unilaterally, and future debtors to do likewise.

The Ross award has been totally misinterpreted. Even though I'm not a former People Express pilot, Continental knowingly granted some pilots on the Eastern Seniority list specific, administrative remedies virtually equal to the LPPs, while denying them to the majority of Eastern pilots, without any reference whatever to Bankruptcy law or RLA law. The RLA does not permit a merger of a few, the whole seniority list had to be merged.

The courts do not have the jurisdiction (1) to unilaterally amend a CBA by editing parts of the agreement; (2) to establish the composition of the members of a Class which are contained under a CBA within the jurisdiction of the RLA; (3) to determine how the Class should be merged; (4) to determine the compensation of the Class; (5) to determine the date of merger; (6) to interpret the CBA; and (7) to determine the amount of the last year of compensation, even if this Court permits the utilization of section 502 (b) (7) of the Bankruptcy Code as a method to unilaterally abrogate the CBA. These are exclusive issues requiring arbitration as mandated by the RLA. Two things are certain: a merger took place, and Continental, acting outside the mandatory parameters of the RLA, merged Eastern pilots into Continental.

II. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS NOT ONLY INTERNALLY INCONSISTENT WITH ITS PREVIOUS RULING IN *CONTINENTAL I*, BUT ALSO IS INCONSISTENT WITH THE FIRM DECISIONS OF THIS COURT AND CREATES A SPLIT WITHIN THE JUDICIAL CIRCUITS THAT THIS COURT SHOULD RESOLVE.

The Court of Appeals for the Third Circuit stated unequivocally in this case that Continental did not reject the EPCBA that provides the former Eastern pilots certain rights and benefits.

The courts never gave relief of the EPCBA and Continental never sought relief in their Confirmation Plan of the other sections of the EPCBA which address pension, medical, and retirement benefits, etc. This holding (that LPP rights had been reduced to bankruptcy "claims") is inconsistent with this Court's decision in *NLRB v. Bildisco &Bildisco*, 465 U.S. 513 (1984),and in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Century Indem. Co. v. National Gypsum Co.(In the Matter of Nat'l Gypsum Co.),* 2008 F.3d 468 (5th Cir.), *cert. denied,*531 U.S. 871 (2000), which expressly holds that, absent rejection, an executory contract does not give rise to a claim in bankruptcy. *Id.* at 507, 508.

In response to this Court's decision in *Bildisco,* Congress enacted Bankruptcy Code 1113. In that section, Congress "created an expedited form of collective bargaining with several safeguards designed to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion" *Century Brass Prods. v. UAW* (*In re Century Brass Prods., Inc.*),795 F.2d 265, 272 (2d Cir.), *cert. denied 479 U.S. 949 (1986).* Section 1113 of the Bankruptcy Code sets forth detailed procedural and substantive requirements a debtor must follow before a bankruptcy court may approve the alteration or rejection of a collective bargaining agreement.

It provides, in two different subsections, that its provisions are the exclusive means by which a collective bargaining agreement can be modified. Subsection (a) states that a debtor may reject a collective bargaining agreement "only in accordance with the provisions of this section" 11 U.S.C. § 1113 (a). And subsection (f) states that: "[n]o provision of [the Code] shall be construed to permit a [debtor] to unilaterally terminate or alter any provision of a collective bargaining agreement prior to the provisions of this section" 11 U.S.C. § 1113 (f)

This language "plainly imposes a legal duty on the

debtor to honor the terms of a CBA, at least until that agreement is properly rejected." *Adventure Resources, Inc. v. Holland,* 137F.3d 786, 796 (4th Cir.), *cert. denied,* 522 U.S. 962 (1998). Consequently, if a debtor fails to reject a collective bargaining agreement, the debtor assumes the agreement by operation of law. *Id.* at 798. See also *In re Roth American, Inc.,* 975 F.2d 949, 957 (3d Cir. 1992).

Although the enactment of Bankruptcy Code 1113 altered the means by which a CBA agreement could be rejected, it did not otherwise alter the applicability of section 365 to such agreements. *Adventure Resources,* ("in erecting § 1113 substantive and procedural obstacles to the unilateral rejection of collective bargaining agreements, Congress did not indicate that it intended to otherwise restrict the general application of section 365 to those agreements"); *Tool & Die Makers Local lodge No., 113 v. Buhrke Indus., Inc.,*1996. Section 1113 applies only to the means by which a collective bargaining agreement may be rejected; the assumption of such agreements continues to be governed by Bankruptcy Code 365. *Norfolk & W. Ry. v. American Train Dispatchers' Ass'n,* 499 U.S. 117, 136 n.2 (1991); *American Flint Glass Workers Union v. Anchor Resolution Corp.,* 197 F.3d 76, 82 (3d Cir. 1999); *Wien Air Alaska, Inc. v. Bachner,* 865 F.2d 1106, 1111 & n.5 (9th Cir. 1989); *Massachusetts Air Conditioning & Heating Corp. v. McCoy,* 196 B.R. 659, 663 (D. Mass. 1996).

Thus, except by the means by which it may be rejected, the treatment of a CBA under section 365, as described by this Court in *Bildisco,* remains unchanged. If the agreement is rejected [in accordance with the requirements of section 1113], it gives rise to a pre-petition general unsecured claim for the damages resulting from the breach. 465 U.S. at 530, 531. If the agreement is assumed, it must be assumed *cum onere,* "and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate." *Id.* at 531-32. As stated by the Court of Appeals for the Ninth Circuit, after the enactment of Bankruptcy Code section 1113:

"To reject a collective bargaining agreement, a debtor must first engage in collective bargaining with the authorized bargaining representative in an attempt to reach a mutually satisfactory modification of the agreement, and then apply for court approval after notice and a hearing. 11 U.S.C. 1113. To assume a collective bargaining agreement, a debtor must cure any default and provide adequate assurance of future performance if the court finds such assurance necessary, 11 U.S.C. §365 (b)(1)."*Wien Air,* 865 F.2d at 1111. *See also Adventure Resources,* 137 F.3d at 798 ("as conditions of the contract's assumption, the debtor [must] cure any existing default and compensate all non-debtor parties for actual pecuniary losses that have resulted therefrom.")

Consistent with the foregoing principles, if a CBA is not rejected, it "rides through" the debtor's bankruptcy proceedings, as if the bankruptcy had never occurred. *National Gypsum,* 208 F.3d at 504 n.4 ("If an executory contract is neither assumed nor rejected, it will 'ride through' the proceedings and be binding on the debtor even after a discharge is granted, thus allowing the non-debtor's claim to survive the bankruptcy.") (*citing Federal's Inc. v. Edmonton Inv. Co.,* 555 F.2d 577, 579 (6th Cir. 1977). *See also Bildisco,* 465 U.S. at 546 n.12 (if "the contract is neither accepted nor rejected, it will 'ride through' the bankruptcy proceeding and be binding on the debtor even after a discharge is granted."); *UFCW Local 211 v. Family Snacks, Inc. (In re Family Snacks, Inc.),* 257 B.R. 884, 907n.19 (B.A.P. 8th Cir. 2001) (if a debtor fails to assume or reject a collective bargaining agreement, the agreement "effectively ' rides through' the bankruptcy process.")

In *Continental I,* this Court upheld the Court of Appeals decision. The courts and I were ignorant of the fact that Continental had assumed the EPCBA. It was Continental responsibility to inform the Bankruptcy Court and the non-debtors of its assumption of the EPCBA.

Early January 2002, I received a copy of the Ross arbitration, in which the arbitrator awarded specific seniority positions to the former Eastern pilots. Some of whom retained the seniority given unilaterally by Continental, and other Eastern pilots were placed in specific positions on the Continental seniority list as dictated within the arbitration award. Nonetheless, all selected Eastern pilots are still merged into Continental. This irrefutable evidence proves; (1) Continental had assumed the EPCBA; (2) the rejection of the EPCBA using Bankruptcy Code 365 (Confirmation Plan) was done in order to have complete unilateral control over the merger and as a union busting tactic; and (3) a merger between the Eastern pilots and the Continental pilots had occurred.

This *de facto* merger calls for the revisiting of Continental I. The debtor not only did not reject the EPCBA under Bankruptcy Code 1113, but also selectively accepted the EPCBA when it merged Eastern pilots into its own pilot force. The debtor cannot have it both ways. In reality, in this case it gets it three ways: (a) debtor does not reject the CBA under Bankruptcy Code 1113, but gets the effect of having done so; (b) debtor accepts the EPCBA when it merges the selected Eastern pilots, but does not have to honor the remaining Eastern pilots rights; and (c) debtor then rejects the EPCBA utilizing using Bankruptcy Code 365.

The abuse of Continental within the bankruptcy courts, and the allowance of those courts to be party to such abuse, has led me to ask this Court to address the RLA and laws to be followed by the lower courts in order to bring resolution to this dispute.

III. THE CERTIFICATION OF A CLASS BY INDIVIDUALS WHO ARE NOT THE COLLECTIVE BARGAINING REPRESENTATIVE, AND THE ACTIONS WHICH LED TO A SETTLEMENT AGREEMENT, ORCHESTRATED BY CONTINENTAL ARE: (1) IN DIRECT VIOLATION OF THE RAILWAY LABOR ACT; (2) ARE IN VIOLATION OF THIS

COURT'S FIRM DECISIONS IN REGARDS TO THE ACT; AND (3) ARE IN VIOLATION SECTION 1113 OF THE BANKRUPTCY CODE.

As stated by the Court of Appeals for the Ninth Circuit, after the enactment of Bankruptcy Code section 1113:

"To reject a collective bargaining agreement, a debtor must first engage in collective bargaining with the authorized bargaining representative in an attempt to reach a mutually satisfactory modification of the agreement, and then apply for court approval after notice and a hearing. 11 U.S.C. 1113. To assume a collective bargaining agreement, a debtor must cure any default and provide adequate assurance of future performance if the court finds such assurance necessary." 11 U.S.C. 365 (b)(1).

As arbitration got closer for the Eastern pilots, Continental was looking for a way to stop the process. After talks with LPP Claimants counsel, Continental suggested a settlement agreement using a class certification mechanism. LPP Claimants' counsel, decided to certify a class with James Baldridge, William Mann, and Larry Dunn as the named plaintiffs.

Once the class was certified, the composition of the class became a problem; the Eastern pilots that had been unilaterally merged at Continental were included within the class certification composition. Continental and class counsel, presented a grossly under inclusive list of Eastern pilots to the Bankruptcy Court, suppressing from the list those Eastern pilots unilaterally merged at Continental.

The Court of Appeals ignored the evidence in which Continental admits that Eastern pilots were secretly merged into the Continental seniority list as part of a separate deal.

Continental never offered the option of seniority integration to any Eastern pilot except those secretly merged.

CONCLUSION

The Eastern Pilots have been denied the right to arbitration guaranteed by federal law. The lower courts have not followed the mandate of this Court.

The Congress of the United States, in its wisdom, has passed legislation requiring mandatory arbitration. That legislation was signed by the Chief Executive Officer of the United States. Furthermore, mandatory arbitration has been completely confirmed by this Supreme Court of the United States, the Appellate Courts (including the Third Circuit in previous rulings) and most Bankruptcy Courts. Now, the Court of Appeals of the Third Circuit has reversed itself, and also allowed a lower court, the Bankruptcy Court to determine the Law of the Land, based upon proven fraudulent representation. The Bankruptcy Court has determined that Congress should be disregarded and all previous firm rulings from the Supreme Court were mistakes. The Appeals Court of the Third Circuit now apparently agrees with the Bankruptcy Court that: 1. Arbitration is not mandatory 2. That any number of judicial remedies, including creation of a mandatory Class, selectively populating that Class with a minimum number of individuals to cover up fraud, ignoring a whole range of benefits, limiting the compensation of the Class, and 3. Requiring that members of the Class hold harmless the Directors and Officers of the company after orchestrating unlawful acts, are permissible. The ramifications resulting from allowing the Bankruptcy Court to establish national labor policy are ominous.

For the reasons described above, I respectfully request the petition for certiorari to the Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

Ramon E. O'Neill,
Appellant, *Pro Se*

No._____

In The

Supreme Court of the United States

RAMON E. O'NEILL

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

and

JAMES BALDRIDGE; WILLIAM MANN; LARRY DUNN, individually and as representative of a class of persons similarly situated who are referred to as LPP CLAIMANTS.

Respondent.

On Petition For A Writ of Certiorari To The United States Court OF Appeals For The Third Circuit
VOL I

PETITION FOR A WRIT OF CERTIORARI

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UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-2374 and 03-2375

IN RE: CONTINENTAL AIRLINES INC., ET AL,

Debtor

RAMON E. O'NEILL

v.

JAMES BALDRIDGE; WILLIAM MANN; LARRY DUNN, individually
and as representatives of a class of persons similarly situated who are referred to as LLP CLAIMANTS

UNITED STATES TRUSTEE

Ramon E. O'Neill,

Appellant

On Appeal From the United States District Court
For the District of Delaware
(D.C. Civ. Nos. 02-CV-00375 and 02-CV-00479)
District Judge: Honorable Sue L. Robinson

Submitted Under Third Circuit LAR 34.1 (a)

March 5, 2004

Before: Sloviter, Nygaard, and Chertoff, Circuit Judges.

(Filed March 9, 2004)

OPINION

PER CURIAM

Ramon O'Neill, a pilot formerly employed by Eastern Airlines, Inc., appeals from an order of the United States District Court for the District of Delaware, affirming the final judgment and order of dismissal of an adversary proceeding in the Continental Airlines, Inc. bankruptcy. We will affirm.

As we write for the parties, we need not set forth the complete procedural and factual history of the case. The history is set forth in detail in In re Continental Airlines, 125 F.3d 120, 124-28 (3d Cir. 1997) ("Continental I"). In that case, we held that the question of whether there had been a "merger" between Continental and Eastern under the terms of the collective bargaining agreement, and thus whether LPP Claimants[1] had standing to maintain an individual claim for seniority integration was a matter for arbitration, and that the District Court properly vacated an injunction against arbitration.

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1. "LPP Claimant's refers to a group of former Eastern pilots [including O'Neill] whose claims in this appeal are based on certain 'labor protective provisions' (LPPs) contained in the collective bargaining agreement." Continental I, 125 F.3d at 124 n.1.

Continental I, 125 F.3d at 130, 137-38. We also held that "any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment." Id. at 136.

Following Continental I, Continental took the position that any seniority integration right acknowledged in arbitration would be subject to the limitations of Bankruptcy Code Section 502 (b)(7), 11 U.S.C. § 502(b)(7), and would thus be limited to one year's back pay based on Continental's pay structure as of January 1991. An attorney for the LLP claimants agreed to bring a declaratory judgment action in the Bankruptcy Court to determine whether § 502(b)(7) applied, and requested class certification for the action. The Bankruptcy Court certified the class under Fed. R. Civ. P. Rule 23(b)(2), and later determined that § 502(b)(7) applied. Based on that finding, the LPP claimants agreed to settle with Continental, with each class member to receive a prepetition general unsecured claim in the amount of $110,000.[2] Continental represented that this amount would be substantially more than the claimants would receive under § 502(b)(7)'s one-year cap.

On January 31, 2002, the Bankruptcy Court held a hearing on a petition to approve the settlement. O'Neill was the sole class member to appear at the hearing to object to the settlement terms. The Bankruptcy Court approved the settlement, finding it to be "in all

2. Although the Class initially appealed the declaratory judgment decision, following settlement, a stipulation for dismissal of the appeal was file on February 19, 2002 and approved by the District Court on February 20, 2002.

respects, fair, reasonable and adequate to the Class." Appellees' App. at 223. Without seeking a stay of the

implementation of the settlement order, O'Neill appealed to the District Court. The appeal was docketed in the District Court at 02-CV-00375 ("the Settlement Order appeal"). On March 6, 2002, Continental filed a motion to compel O'Neill to comply with the settlement order. The Bankruptcy Court entered an order granting the motion on May 2, 2002. O'Neill's appeal from that order was docketed in the District Court at 02-CV-00479 (the "Compliance Order appeal").

After motions and briefs were filed in the District Court, the Court entered an order on April 1, 2003, captioned with both district court docket numbers, which affirmed the Bankruptcy Court's settlement order, found the Settlement Order appeal moot, and granted the appellees' motions to dismiss. The Court also held that the Compliance Order appeal was mooted by the resolution of the Settlement Order appeal. This timely appeal followed.[3]

O'Neill's appeal appears to raise three main points. First, he argues that Continental perpetrated a fraud on the court by failing to disclose the "Ross arbitration," whereby former People Express pilots, some of whom were on Eastern's pilot seniority list, were integrated into Continental's work force, while all other Eastern pilots were precluded from a specific performance award. O'Neill appears to argue that due to this

3. On the same day that O'Neill filed his Notice of Appeal, the District Court denied his request for rehearing en banc. Although O'Neill's Notice of Appeal does not mention this order, to the extent that he intended to appeal that order, we hold that the District Court did not abuse its discretion in denying the motion for rehearing.

new evidence, Continental I should be overturned. Second, O'Neill argues that the settlement was not fair, as the $110,000 does not cover his last year's compensation. Third, O'Neill argues that his right to arbitration was not

extinguished by the settlement. In the course of these arguments, O'Neill seems to argue that he was not properly represented by class counsel.

Continental argues (and the class representative appellees make similar arguments) that O'Neill cannot argue that there is any basis for relief on appeal because he failed to appeal the Bankruptcy Court's order granting class certification, and he failed to appeal the Bankruptcy Court's order finding that any claim would be capped by Bankruptcy Code § 502(b)(7). The appellees also agree that O'Neill's appeal is moot.

We turn first to the issue of mootness, because, if a case is constitutionally moot, we lack power to hear it. United Artists Theatre Co. v. Walton, 315 F.3d 217, 226 (3d Cir. 2003). A case is constitutionally moot only if the court cannot fashion any form of meaningful relief. In re Continental Airlines, Inc., 91 F.3d 553, 558 (3d Cir. 1996) (en banc), cert. denied, 519 U.S. 1057 (1997). We do not find the case to be constitutionally moot. If we were to find that the settlement in this case was unfair to the class, we cannot say that there would be no possible relief for the Appellant.

The District Court's holding that O'Neill's appeal was moot may refer to equitable mootness; a doctrine which "prevents a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became

extremely difficult to retract." Nordhoff Investments, Inc. v. Zenith Electronics Corp., 258 F.3d 180, 185 (3d Cir. 2001).[4] The equitable mootness inquiry "is a more limited inquiry into whether, though we have the power to hear a case, the equities weigh against upsetting a bankruptcy plan that has already been confirmed." United Artists, 315 F.3d at 226.

Particularly significant here is the fact that O'Neill did not obtain a stay of the settlement confirmation. See In re Chateaugay Corp., 988 F.2d 322, 325 (2d Cir. 1993) (party who appeals without protection of stay does so at his own risk). However, we decline to engage in a complete analysis of whether the appeal is equitably moot. Rather, we will, like the District Court, affirm the Settlement Order on the merits.

We review a district court's decision to approve a proposed settlement of a class action for an abuse of discretion. Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975). We likewise review a court's grant of class certification under an abuse of discretion standard. Newton v. Merrill Lynch, Pierce, Fenner & Smith, 259 F.3d 154, 165-66 (3d Cir. 2001). Appellees argue that O'Neill cannot challenge the class certification, as he

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4. To determine whether an appeal is equitably moot, the court examines five factors:

(1). whether the reorganization plan has been substantially consummated,
(2). whether a stay has been obtained,
(3). whether the relief requested would affect the rights of the parties not before the court,
(4). whether the relief requested would affect the success of the plan, and
(5). the public policy of affording finality to bankruptcy judgments.

In re: Continental Airlines, Inc., 91 F.3d at 560.

did not file an appeal of the order certifying the class. However, we hold that to the extent he objected to the class certification at the settlement hearing, he preserved his right to object to the certification on appeal. In re Integra Realty Resources, Inc., 354 F.3d 1246, 1261-62 (10th Cir. 2004).

O'Neill did object to the class certification at the

hearing, but he only objected to the extent that he felt the class was underinclusive, as it failed to include certain pilots, including those pilots who were parties to the Ross arbitration. This is related to O'Neill's first major point: that this Court should overturn Continental I and the settlement agreement because Continental failed to disclose the Ross arbitration in its bankruptcy.[5] The Bankruptcy Court noted that the Ross arbitration decision dealt with former Peoples Express pilots; and, while they may have been Eastern pilots at some point, the arbitration award was based on the Peoples Express pilots should be members of the present class; and that if they were, he would be entitled to a specific performance award so that all class members would be treated equally. O'Neill has not represented that he was a former Peoples Express pilot. Thus, he is not entitled to the same treatment as those pilots. Further, his argument fails as this Court has already limited class members' relief to money damages. Continental I, 125 F.3d at 136.

5. Continental declined to discuss this issue in its brief "because matters relating to the so-called 'Ross Arbitration' are not contained in the record on appeal . . . ." Brief at 14. We note that the Ross arbitration was discussed at length in the settlement fairness hearing, and thus find that it is proper subject of appeal.

To the extent that O'Neill argued that other pilots were missing from the class list, the settlement, as approved by the Bankruptcy Court on January 31, 2002, included a clause which allowed other class members who met the definitions to file a claim by April 3, 2002. Thus, this objection to the class certification was remedied by the Bankruptcy Court.

O'Neill's second argument is that the settlement is not fair. Given our previous holding that any claim based on award of seniority integration would be satisfied by a

monetary claim in bankruptcy, the Bankruptcy Court's holding that any such claim would be limited to one-year's salary pursuant to § 502(b)(7),[6] and the fact that the settlement provided two to three and one-half times the one-year cap for every class member, we hold that the Bankruptcy Court did not abuse its discretion in finding that the settlement was fair. O'Neill argues on appeal that the $110,000 settlement amount does not cover his last year's compensation. O'Neill's argument appears to be based on his salary at Eastern, rather than what his salary would have been at Continental. As class counsel pointed out at the fairness hearing, even if an arbitrator found that O'Neill's seniority had been preserved through the LPPs, his position would have been subject to Continental's pay structure. Appellees' App. at 185. O'Neill conceded in the fairness hearing that the maximum Continental salary was $64,000. Appellees' App. at 187. Thus, the $110,000

6. As Appelles note, we cannot reach the merits of whether the Bankruptcy Court correctly found that § 502(b)(7) applied, as no party preserved a timely appeal to that final decision.

exceeds any amount he could have recovered in arbitration, as the amount would be subject to the cap of § 502(b)(7).

Finally, O'Neill argues that his right to arbitration survives the settlement. We disagree. If O'Neill were to return to arbitration, the arbitrator might recognize his right to seniority integration under the LPPs. However, any amount awarded by the arbitrator would be subject to § 502(b)(7)'s cap and would be less than he can recover under the settlement. Any relief awarded by the arbitrator would be meaningless; thus, O'Neill's right to arbitration has been mooted by the settlement.

For the foregoing reasons, we will affirm.

THE UNITES STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2374
No. 03-2375

IN RE: CONTINENTAL AIRLINES INC., ET AL,
Debtor

RAMON E. O'NEILL
v.

JAMES BALDRIDGE; WILLIAM MANN; LARRY DUNN, individually and as representatives of a class of persons similarly situated who are referred to as LLP CLAIMANTS

UNITES STATES TRUSTEE

Ramon E. O'Neill,
Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civ. No. 02-cv-00375)

SUR PETITION FOR PANEL REHEARING

BEFORE: SLOVITER, NYGAARD and CHERTOFF,
Circuit Judges

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ Richard L. Nygaard
United States Circuit Judge

DATE: April 23, 2004

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re:

CONTINENTAL AIRLINES, INC., et al.,

Debtors.

RAMON E. O'NEILL,

Appellant,

v.

JAMES BALDRIDGE, WILLIAM MANN and LARRY DUNN, individually and as representatives of a class of persons similarly situated who are referred to as LPP CLAIMANTS,

Appellees.

Chapter 11

Case Nos. 90-932 through 90-984-MFW

Jointly Administered

C.A. No. 02-375-SLR
C.A. No. 02-479-SLR

MEMORANDUM ORDER

At Wilmington this 31st day of March, 2003, having reviewed appellees' motions to dismiss the above captioned appeals and the papers submitted in connection therewith;

IT IS ORDERED that said motions (02-375/D.I. 27; 02-479/D.I. 6) are granted, for the reasons that follow:

1. **Standard of Review.** This court has jurisdiction to hear an appeal from the bankruptcy court pursuant to 28 U.S.C. § 158 (a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's

legal conclusions. See Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F. 3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a de novo basis bankruptcy court opinions. In re Hechinger, 298 F.3d 219, 224 (3d Cir. 2002); In re Telegroup, 281 F.3d 133, 136 (3d Cir. 2002).

2. **Background.** The underlying dispute has a long and convoluted procedural history. On February 23, 1986, Eastern Airline ("Eastern") and its pilots' union, the Air

Lines Pilot Association ("ALPA"), ratified a collective bargaining agreement. On February 24, 1986, Texas Air Corporation, the parent of Continental Airlines, Inc. ("Continental"), acquired Eastern. ALPA asserted that the acquisition was a merger requiring integration of the Eastern and Continental pilots' seniority lists under Eastern's collective bargaining agreement. When

Eastern and Continental refused to bargain with ALPA on the issue, ALPA initiated arbitration.

3. In March 1989, Eastern filed for protection under chapter 11 of the Bankruptcy Code and asserted that the automatic stay precluded ALPA from proceeding with the arbitration. After protracted litigation, the Court of Appeals for the Second Circuit held that the automatic stay did not preclude arbitration. In re Ionosphere Clubs, Inc., 922 F. 2d 984 (2d Cir. 1990). ALPA and Eastern thereafter proceeded with arbitration, during which ALPA sought prospective integration of the Eastern and Continental pilots' seniority lists and back pay until the integration was completed.

4. Continental filed for protection under chapter 11 of the Bankruptcy Code in December 1990. ALPA (and certain individual Eastern pilots) filed unliquidated proofs of claim in that proceeding. Continental filed objections and sought a declaration that the claims were general unsecured prepetition dischargeable claims compensable by an award of monetary damages. ALPA disagreed and asserted that the pilots were entitled to specific performance of the collective bargaining agreement, namely, seniority integration. In addition, ALPA asserted that only the arbitrator had jurisdiction to determine whether a merger had occurred as defined by the collective bargaining

agreement.[1]

5. The United States Court of Appeals for the Third Circuit ultimately held "that any claim based on an award of seniority integration arising out of the resolution of the [labor arbitration] dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the right to seniority integration is satisfiable by the payment of money damages." In re Continental Airlines, 125 F.3d 120, 136 (3d Cir. 1997). The Third Circuit prefaced its holding with the following language:

> We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the [labor arbitration] dispute. Our holding is limited to how the claims should be treated in bankruptcy.

Id. At 136. In other words, the Third Circuit, in its 1997 decision, determined the proper forum (arbitration) for resolution of the pilots' substantive rights (whether they have seniority integration rights), while maintaining the bankruptcy court's jurisdiction to determine the "manner in which the

1. On October 12, 1999, James Baldridge, William Mann and Larry Dunn, individually and as the representatives of a number of former Eastern pilots (referred to as the "LPP Claimants" since 1991), filed an adversary proceeding against Continental. By order dated February 3, 2000 and amended July 10, 2001, the bankruptcy court certified a non-opt out class that included appellant (the "Baldridge LPP Class"). Appellant did not object to entry of the class certification order nor did he seek an appeal from that order.

[claims] in bankruptcy would be treated if a right to seniority integration is established." Id. at 131, n. 8.[2]

6. By order dated October 12, 2000, the bankruptcy

court granted summary judgment to Continental, finding that, if the Eastern pilots established their right to seniority integration in arbitration, each of the pilots' claims would be treated as a general unsecured prepetition claim and that the value of each such claim for payment purposes would be limited to one year's wages pursuant to Rule 502 (b) (7). (Bk. Case No. 90-932, D.I. 46)

7. Although appellant did not file and individual appeal from that order, an appeal from this order was filed by the "Baldridge LPP Class Action" plaintiffs.

8. On or about November 26, 2001, a settlement notice was sent to each member of the "Baldridge LPP Class," including appellant. (D.I. 1, attachment at Ex. A) After a hearing, the bankruptcy court entered an order in January 31, 2002 (the "Settlement Order") approving a settlement (the "Settlement Agreement") between the Baldridge LPP Class (appellees herein)

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2. Despite the Third Circuit's ruling, a group of dissatisfied Eastern pilots thereafter filed a lawsuit in the United States District Court for the District of New Jersey seeking enforcement of their collective bargaining rights outside the arbitration proceeding. That lawsuit was transferred to this court and thereafter dismissed. Eastern Pilots Merger Committee v. Continental Airlines, C.A. No. 99-795-SLR (D. Del. September 12, 2000), aff'd, 279 F. 3d 226 (3d Cir. 2002), cert. denied, ___ U.S. ___, 123 S. Ct. 345 (2002).

and Continental, whereby:

a. The bankruptcy court dismissed "on the merits with prejudice . . . any and all claims, actions, requests for relief or causes of action alleged in the Baldrige class action complaint by plaintiffs and the members of the class as to all Defendants." (D.I. 1, attachment at Ex. A, ¶ 5)

b. The Class Representatives "shall be deemed to have released and forever discharged each and every Settled Claim which they, or any of them had, may have had, now

have or have as of the Effective Date of the Settlement against the Released Parties." (Id. at ¶6)

c. Class Counsel, on behalf of the Class Representatives and the Class, "shall file a dismissal with the clerk of the United States District Court for the District of Delaware of the Baldridge LPP Class Action plaintiffs' pending appeal of the October 12, 2000 Order and Opinion of [the bankruptcy court]. (Id. at ¶ 7)

d. Class Councel, on behalf of the Class Representatives and the Class, "shall withdraw its Demand for LPP Arbitration filed with the National Mediation Board in March 1998." (Id. at ¶ 8)

e. "[T]he Class Representatives and all of the Members of the Class and anyone claiming through any of them will be forever barred and enjoined from commencing, instituting or

prosecuting any action or other proceeding in any court of law or equity, arbitration tribunal or administrative or other forum directly, representatively or derivatively against any of the Released Parties as to any of the Settled Claims." (Id. at ¶ 9)

f. As the court understands the terms of the settlement, the Class members should receive under the settlement "a claim value two to three and one-half times one year's wages . . ." (D.I. 29 at ¶ 3)

9. **Analysis of the merits.** In his appeal, appellant essentially argues that the Baldridge LPP class does not have the authority to enter into an agreement with Continental "that overrides the September 29, 1997, Third Circuit Court of Appeals decision." (D.I. 25, ¶ 15) Appellant characterizes the September 29, 1997 decision as holding "that the rights of individual pilots to pursue their claims for seniority integration would be an issue folding within to the exclusive jurisdiction of an arbitrator selected in accordance

of Section 13(a) of the Labor Protective Provisions." (D.I. 25, ¶ 13)

10. Appellant's reading of the Third Circuit's decision is legally incorrect, as is abundantly clear from the procedural history recited above. The Third Circuit limited the scope of the arbitrable question to be whether the Eastern pilots have established seniority integration rights. The Third Circuit further determined that if those rights were established, they

would be satisfiable by the payment of money damages. The bankruptcy court limited the amount of money damages to one year's wages. The Settlement Agreement at issue increased the maximum claim award by two- or three- fold. Appellant did not individually appeal from the class certification order or from the summary judgment order of the bankruptcy court. The Settlement Agreement moots the arbitration proceeding by recognizing the Eastern pilots' claims to seniority integration and gives to members of the Baldridge LPP Class more value than that provided for in the bankruptcy court's summary judgment decision.

11. **Mootness.** Not only is appellant's position untenable, but the appeal is moot, given the withdrawal of the pending appeals and the distribution of consideration to class members, acts in furtherance of the settlement which cannot be undone.

12. **Conclusion.** For the reasons stated above, the motions to dismiss are granted; the January 31, 2002 Settlement Order

entered by the bankruptcy court is affirmed and the appeal dismissed.[3]

s/s: Sue L. Robinson
United States District Judge

3. To convolute the procedural history of this dispute even further, the sole appellant to actually appear at the settlement hearing in order to formally object to the terms of the settlement was Ramon E. O'Neill. Mr O'Neill appealed the Settlement Order to this court in C.A. No. 02-375-SLR. A series of "joinders" in that appeal were filed by numerous other individuals. On May 2, 2002, the bankruptcy judge entered an order which, in effect, directed Mr. O'Neill (and only Mr. O'Neill) to comply with the terms of the Settlement Order (the "Compliance Order"). Mr. O'Neill appealed the Compliance Order to this court in C.A. No. 02-479-SLR. Although various of the other appellants who joined with Mr. O'Neill in his appeal from the Settlement Order also appealed from the Compliance Order, they lack standing to do so because the Compliance Order was directed only to Mr. O'Neill. In any event, the Compliance Order appeal has been mooted by the resolution of the Settlement Order appeal.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
CONTINENTAL AIRLINES, INC., et al.,	Case Nos. 90-932 through 90-984-MFW
Debtors	Jointly Administered
RAMON E. O'NEILL,	
Appellant,	
v.	C.A. No. 02-375-SLR
JAMES BALDRIDGE, WILLIAM MANN and LARRY DUNN, individually and as representatives of a class of persons similarly situated who are referred to as LPP CLAIMANTS,	
Appellees.	

MEMORANDUM ORDER

At Wilmington this 28th day of April, 2003, having reviewed appellant's motion for re-hearing en banc of the court's March 31, 2003 Memorandum Order;

IT IS ORDERED that said motion (D.I. 33) is denied, the court finding no justification for convening an en banc empanelment of the district court to reconsider its March 31, 2003 decision to dismiss appellant's case. See 28 U.S.C. § 132 (c) (authority of district court to consider certain issues

en banc) ; United States v. Anaya, 509 F. Supp. 289 (S.D. Fla. 1980) ; see generally Max's Seafood Café ex-rel. Lou-Ann, Inc. v.

1.

Quinteros, 176 F. 3d 669, 677 (3d Cir. 1999) (limited basis for reconsideration of reargument motions).

s/ Sue L Robinson
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:	}	
	}	Case No. 90-932
CONTINENTAL AIRLINES, INC., et al.,	}	Chapter 11
	}	
Debtors	}	
	}	
JAMES BALDRIDGE, WILLIAM MANN, and LARRY DUNN, individually, and as representatives or a class of persons similarly situated who are referred to as the LPP CLAIMANTS,	}	
	}	
Plaintiffs,	}	Adversary Proceeding
	}	No. A-99-412
v.	}	Class Action
	}	
CONTINENTAL AIRLINES HOLDINGS, INC., CONTINENTAL AIRLINES, INC. and SYSTEM ONE HOLDINGS, INC.	}	
	}	
Defendants.	}	

FINAL JUDGMENT AND ORDER OF DISMISSAL

This matter having come before this Court on Motion for Approval of a Settlement in this class action, and the Court, having considered all papers filed in connection with said motion, good cause appearing therefore, it is, ORDERED, ADJUDGED AND DECREED THAT:

1.

1. This Court has jurisdiction over the subject matter of this litigation and over all Parties, including all members of the Class.

2. On November 26, 2001: (a) the Class Settlement Notice, together with copies of the Proof of Claim substantially in the forms annexed as Exhibits 1 to 3 to Exhibit B, respectively, to the Settlement Agreement were mailed by First Class Mail to all members of the Class as identified on Exhibit C to the Settlement Agreement at their addresses listed therein; (b) the Summary Notice for Publication, substantially in the form annexed as Exhibit 2 to Exhibit B to the Settlement Agreement was published once in the National Edition of USA Today on December 3, 2001; and (c) both the Summary Notice for Publication and the Class Settlement Notice were posted on the Internet by Class Counsel on November 27, 2001. Such notice is hereby determined to be in full compliance with Rule 23 of the Federal Rules of Civil Procedure and of due process, is found to be the best notice practicable under the circumstances, and to constitute due and sufficient notice to all Persons entitled thereto.

3. The Court finds that the Class consists of those persons identified on Exhibit A attached hereto, without prejudice to persons who file a Proof of Claim on or before April 3, 2002 and who establish, to the mutual agreement of the parties, or, absent same, to the Court, that they satisfy all criteria necessary to be included in the Class.

4. This Court hereby approves the Settlement set forth in the Stipulation and Agreement of Compromise and Settlement (the "Settlement Agreement") dated

2.

October 16, 2001, and finds that the Settlement of the claims of the Plaintiffs and the Class embodied therein is, in all

respects, fair, reasonable and adequate to the Class. The terms and phrases used in this judgment shall have the same definition and meaning as in the Settlement Agreement.

5. The Court hereby dismisses on the merits withprejudice and without costs or attorneys' fees except as provided for in the Settlement Agreement, any and all claims, actions, requests for relief or causes of action alleged in the Baldridge class action complaint by Plaintiffs and the members of the Class as to all Defendants.

6. Upon the Effective Date, the Class Representatives and the Class, on behalf of themselves, the Persons they represent, their heirs, predecessors, successors and assigns, or any Person claiming or purporting to claim through any of the foregoing, for good and sufficient consideration, the adequacy of which is hereby acknowledged, shall be deemed to have released and forever discharged each and every Settled Claim which they, or any of them had, may have had, now have or have as of the Effective Date of the Settlement against the Released Parties.

7. Upon the Effective Date, Class Counsel, on behalf of the Class Representatives and the Class, shall file a dismissal with the clerk of the United States District Court for the District of Delaware of the Baldridge LPP Class Action plaintiffs' pending appeal of the October 12, 2000 Order and Opinion of this Court.

3.

8. Upon the Effective Date, Class Counsel, on behalf of the Class Representatives and the Class, shall withdraw its Demand for LPP Arbitration filed with the National Mediation Board in March, 1998.

9. Upon the Effective Date, the Class Representatives and all of the Members of the Class and anyone claiming through any of them will be forever barred and enjoined from commencing, instituting or prosecuting any action or other proceeding in any court of law or equity, arbitration

tribunal or administrative or other forum directly, representatively or derivatively against any of the Released Parties as to any of the Settled Claims.

10. The Settlement Agreement, all proceedings undertaken in accordance with the terms set forth therein and all papers relating to it are not, and shall not be construed to be, an admission by any Party of either the validity of any of the claims or defenses or of liability to Plaintiffs, any member of the Class or any others with respect to any LPP claim arising out of the alleged Eastern merger, which liability is hereby expressly denied and disclaimed by Continental. The Settlement Agreement and any of the papers, negotiations, transactions or proceedings relating thereto, or any of the terms hereof or recitations herein, shall not be offered or received in evidence in any proceeding as an admission on the part of the Parties, or any of them, of liability or of the merit or lack of merit of any claim or defense.

11. This Court has reviewed the application of Class Counsel for an award of attorneys' fees and hereby awards Class Counsel 30% of the Gross

Settlement Consideration which shall be paid to Class Counsel upon the Effective Date.

12. This Court has reviewed the application of Class Representatives James Baldridge, William Mann and Larry Dunn for a compensation award and hereby awards each, for the services each performed as Class Representatives in this litigation, 1,700 shares of Continental Airlines common stock to be distributed from the Gross Settlement Consideration upon the Effective Date.

13. This Court has reviewed the application of Class Counsel for reimbursement of expenses advanced by Eastern Pilots for Fairness, Inc. and hereby awards Eastern Pilots for Fairness, Inc. $95,530.14 to be paid from the Gross

Settlement Consideration upon the Effective Date.

14. This Court has reviewed the application of Class Counsel for the payment of claims administration and publication expenses of the Claims Administrator and hereby awards The Garden City Group, Inc. claims administration expenses not to exceed $49,140.48 to be paid from the Gross Settlement Consideration upon the Effective Date.

15. If this Final Judgment is reversed, vacated, or modified, this Final Judgment (except for this Paragraph and paragraph 10 herof) shall be rendered null and void and vacated *nunc pro tunc*, the Settlement shall be deemed terminated pursuant to the terms of the Settlement Agreement and the Parties shall be deemed to have reverted to their respective status and position as provided in Article VIII of the Settlement Agreement.

5.

16. Without in any way affecting the finality of this Final Judgment, this Court hereby reserves and retains continuing jurisdiction over matters subsequently arising concerning this Settlement, including performance of the Settlement Agreement and the Settlement embodied therein, including, but not limited to the award of attorneys' fees, costs and expenses to Class Counsel and the Class from the Gross Settlement Consideration, the approval or rejection of any Proofs of Claim filed by members of the Class, the approval of settlement Administration Costs and the distribution of the proceeds of the Settlement in accordance with the Settlement Agreement and Continental's Revised Second Amended Joint Plan on Reorganization.

SO ORDERED January 31, 2002.

BY THE COURT:

s/ Mary F. Walrath
United States Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In Re:	Chapter 11
CONTINENTAL AIRLINES, INC., et al.,	Case Nos. 90-932 (MFW) Through 90-984 (MFW)
Debtors	Jointly Administered
JAMES BALDRIDGE, WILLIAM MANN, and LARRY DUNN, individually, and as representatives of a class of persons similarly situated who are referred to as the LPP CLAIMANTS,	
Appellants,	Adversary No. 99-412 (MFW)
v.	
CONTINENTAL AIRLINES HOLDINGS, INC., CONTINENTAL AIRLINES, INC. and SYSTEM ONE HOLDINGS, INC.	
Appellees.	

ORDER RE: DOCKET NO. 118

AND NOW, the Court having considered the Motion Of Continental To Enforce Compliance With Court Order (the "Motion") And Objection Of Continental To Request

For Extension Of Deadline From Rule 8006 (the "Objection") dated March 4, 2002 [Docket No. 118; and the Court having considered the responses filed by Ramon E. O'Neill (O'Neill) [Docket Nos. 153 and 164] and the joinder filed by the LPP Class Action Plaintiffs [Docket No. 152] and

1.

all related pleadings: and a hearing having been held on April 2, 2002 (the "Hearing"); and for the reasons stated by the Court on the record at the Hearing, it is hereby

ORDERED that the Motion is granted; and it is further

ORDERED that absent further order of this Court or an appellate court. O'Neill is bound by the terms of the Court's Final Judgment and Order of Dismissal, dated January 31, 2002, a copy of which is attached hereto as Exhibit A (the "Final Judgment"), and specifically O'Neill and anyone acting on his behalf or at his direction are enjoined from commencing, instituting or prosecuting any action or other proceeding in any court of law or equity, arbitration tribunal or administrative or other forum against Continental as to any of the Settled Claims as that term is defined in the Final Judgment; and it is further

ORDERED, that O'Neill and anyone acting on his behalf or at his direction is prohibited from attempting to cause any LPP class member to forgo their right to participate in the class action settlement by advising them they have a current right to appeal the Final Judgment and/or that they have a current right to join an arbitration for enforcement of the labor protective provisions against Continental; and it is further

ORDERED, that pursuant to Bankruptcy Rule 8011, O'Neill's Request For Extension Of Deadline From Rule 8006 and Continental's Objection thereto are properly considered by the District Court.

Dated: Wilmington, Delaware
May 2, 2002

s/ Mary F Walrath
United States Bankruptcy Judge

IN RE: CONTINENTAL AIRLINES,

Debtor

AIR LINE PILOTS ASSOCIATION

v.

CONTINENTAL AIRLINES
LPP CLAIMANTS; EFFECTIVE DATE COMMITTEE,

Claimants

HONORABLE JOHN STONITSCH,

Trustee

CONTINENTAL AIRLINES, INC.

Appellant No. 96-7038

(Captioned amended in accordance with Clerk's Order dated 3/4/96)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 93-cv-00163)

ARGUED MARCH 13, 1997
BEFORE: MANSMANN, LEWIS and MICHEL,* *Circuit Judges.*

(Filed August 29, 1997)

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* Honorable Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

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OPINION OF THE COURT

LEWIS, *Circuit Judge.*

In this appeal and cross-appeal, we are confronted with a tension between bankruptcy law and labor law. The dispute arose when the Air Line Pilots Association, Inc. ("ALPA"), collective bargaining agent for Eastern Air Lines' ("Eastern") pilots, filed proofs of claim in bankruptcy court against Continental Airlines Holdings, Inc. and Continental Airlines, Inc. ("Continental"). These claims were based on alleged seniority integration rights stemming from a pending labor arbitration dispute and were filed following Continental's acquisition of Eastern and subsequent refusal to bargain over the seniority integration of Eastern's pilots.

The bankruptcy court determined that the claims could be satisfied by monetary awards in lieu of specific performance and enjoined scheduled arbitration proceedings to enforce the seniority rights under the collective bargaining agreement. The district court affirmed the bankruptcy court's determination relating to the claims, but vacated the injunction. Two groups of former Eastern pilots, the LPP Claimants and the Group of 31, both of which are no longer represented by ALPA, appealed to this court.[1]

Resolution of this dispute requires us to determine: (1) whether the bankruptcy claims that the LPP Claimants and the Group 31 seek to enforce constitute "claims" within the meaning of the bankruptcy code and thus are satisfiable, in the alternative, by a monetary award; and (2) whether the arbitration of a labor dispute that may give rise

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1. "LPP Claimants' refers to a group of former Eastern Pilots whose claims in this appeal are based on certain "labor protective provisions" (LPPs) contained in the collective bargaining agreement. The "Group of 31" is a group of former Eastern pilots, who originally were part of the "LPP Claimants" group and who have retained separate counsel for purposes of this appeal. See discussion infra Part I.D. While both groups claims were filed in bankruptcy court by ALPA on their behalf,

these two groups are no longer represented by ALPA. See discussion *infra* note 5.

4.

to the right to seniority integration under a collective bargaining agreement can be enjoined, where the debtor has not explicitly rejected the agreement. We conclude that the rights to seniority integration do constitute "claims" within the meaning of the bankruptcy code. Accordingly, we find that the right to seniority integration gives rise to a right of payment and that any equitable remedy recovered against Continental via arbitration of the underlying labor dispute may be satisfied through an award of monetary damages. We further conclude that the district court properly vacated the injunction barring arbitration of the underlying labor dispute. Thus, we will affirm.

I.

A. The Underlying LPP Dispute

On February 23, 1986, following intense negotiations, Eastern and its pilots' union, ALPA, ratified a collective bargaining agreement. On February 24, 1986, the Texas Air Corporation ("Texas Air"), parent corporation to Continental, acquired Eastern. Believing that the acquisition constituted a "merger" within the meaning of certain "labor protective provisions" (LPPs) contained in the collective bargaining agreement, ALPA requested a meeting with Texas Air, Eastern, and Continental to discuss the integration of Eastern's and Continental's seniority lists. Under the LPPs, Eastern's pilots secured protection of their seniority rights in the event of a merger between Eastern and another airline carrier through the integration of Eastern's seniority lists with the merging carrier's list. Specifically, the LPP terms provide:

Section 2(a). The term "merger" as used herein means

joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be
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> 5.
>
> made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representative of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
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> * * *
>
> Section 13(a). In the event that any dispute or controversy . . . arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination.

(Labor Protective Provisions, sections 2(a), 3, and 13(a)).[2]

Despite ALPA's requests, both Eastern and Continental refused to bargain with ALPA about the integration of the seniority lists. Consequently, ALPA requested the National Mediation Board to proffer a list of seven arbitrators from which a neutral arbitrator could be chosen to determine whether an alleged merger occurred between Eastern and Continental that triggered the LPP seniority integration provision (LPP dispute). Eastern, however, filed for

bankruptcy in March, 1989, and refused to submit to arbitration pursuant to the bankruptcy code's section 362 automatic stay provision. 11 U.S.C. § 362 (providing that petitions filed pursuant to Chapter 11 operate as a stay of the commencement or continuation of judicial, administrative, or other actions or proceedings against the debtor). In bankruptcy court, ALPA sought relief from the automatic stay to compel Eastern to arbitrate the LPP

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2. The LPPs were based on the standard Allegheny-Mohawk LPPs, which were designed to provide "displacement and dismissal allowances to employees adversely affected by [merger] transactions[s], the equitable integration of seniority list, and binding arbitration of disputes relating to the LPPs." (Decision of the Eastern Air Lines Pilots System Board of Adjustment). *See Air Pilots Ass'n v. Dept. of Transp.*, 838 F.2d 563. 565 (D.C. Cir. 1988) (citing *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1972))

dispute. The bankruptcy court denied ALPA's petition. After much litigation, however, the Court of Appeals for the Second Circuit held that the section 362 automatic stay provision did not preclude arbitration in this instance. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990).

ALPA and Eastern proceeded to arbitration in April, 1991, commencing with a pre-hearing conference before Richard R. Kasher (Kasher Arbitration). In this proceeding, ALPA sought prospective integration of seniority lists, back pay from the effective date of the merger to the date of the arbitration award to the date that the Eastern pilots would complete training and begin flying for Continental. Prior to the pre-hearing conference, Arbitrator Kasher solicited brief statements of position from the parties to the dispute, and from all potential parties. Eastern consistently maintained that the LPP dispute was not properly within the arbitrators jurisdicition.[3] Continental filed a statement informing Arbitrator Kasher that it had filed a Chapter 11 petition for

reorganization in December, 1990. Therefore, it maintained that the arbitration pursued by ALPA was stayed under section 362 of the bankruptcy code and could not proceed without the express approval of the bankruptcy court.

In August, 1992, Arbitrator Kasher issued a decision concluding that he had jurisdiction over the LPP dispute, and could render a determination of the appropriate remedies under the circumstances. Kasher, relying on the bankruptcy court's determination in *In re Ionosphere Clubs, Inc.*, 114 B.R. 379 (Bankr. S.D.N.Y. 1990), specifically rejected Continental's suggestion that the arbitration was barred by the automatic stay. Kasher scheduled hearings on the merits of the dispute, to commence in February, 1993.

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3. Eastern maintained that only the System Board of Adjustment had jurisdiction to determine whether a merger occurred that triggered the LPPs. On the merits, Eastern contended that if the arbitration proceeded, the Arbitrator should conclude that no merger occurred.

B. *The Bankruptcy Court Proceedings*

In September, 1991, while the initial Kasher Arbitration decision was pending, ALPA, on behalf of its members, filed proofs of claim against Continental in Delaware Bankruptcy Court. Their claims were based on the asserted right to seniority integration under the LPPs and specified an unliquidated amount as the debt for which Continental was obligated. In response, Continental initiated an adversary proceeding in bankruptcy court against ALPA, seeking injunctive and declaratory relief relating to the proofs of claim. In that action, Continental filed a Partial Objection To Allowance of Claims and a Motion for Partial Summary Judgment on its Partial Objection.[4] In both motions, Continental contended that the seniority integration that the claimants sought was not feasible because it would be detrimental to Continental's successful reorganization.

Thus, Continental sought a declaration that the claims were, at best, "general, dischargeable, pre-petition, unsecured claims," compensable by an award of monetary damages.

ALPA and the LPP Claimants each filed a separate response to Continental's Partial Objection and Motion for Partial Summary Judgment.[5] ALPA contended that, contrary to Continental's argument, the claims pursued were not general, unsecured pre-petition claims that could be converted to a payment of money damages. ALPA also argued that only an arbitrator had jurisdiction to determine

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4. Prior to the Kasher Arbitration decision, Continental filed an initial motion for partial summary judgment, seeking a preliminary injunction. Continental argued that the arbitration should be enjoined to protect the jurisdiction of the bankruptcy court over the administration of its estate. It also maintained that the automatic stay provision of the bankruptcy code precluded that arbitration from proceeding. Finally, Continental contended that it was not a party to the collective bargaining agreement between Eastern and ALPA and that it could not be bound by the result of any arbitration over the LPPs.

5. ALPA's representation of the LPP Claimants ceased after the LPP Claimants instituted actions in federal court against ALPA. The actions alleged causes of action for the breach of the duty of fair representation and defamation arising out of the publication and dissemination of a "blacklist" and for alleged violations of the civil provisions of RICO.

the appropriate remedy under the LPPs. The LPP Claimants essentially maintained that an arbitration proceeding was the appropriate forum to determine the issue of whether a merger occurred that triggered the LPPs, and that the proper remedy was integration of Eastern's seniority lists with Continental's lists.

In February, 1993, the bankruptcy court judge, in two orders, granted Continental's Partial Objection To Allowance of Claims and its related motion for partial summary judgment, determining that there was no genuine issue for trial and that Continental was entitled to judgment

as a matter of law. *In re Continetal Airlines, Inc., et al.*, Nos. 90-932 through 90-984 (Bankr. D. Del. Feb. 11, 1993) (order granting motion for partial objection to allowance of claims); In re Continental Airlines, Inc., et al., No. 91-153 (Bankr. D. Del. Feb. 11, 1993) (order granting motion for partial summary judgment). Addressing the jurisdictional argument asserted by ALPA, the bankruptcy court concluded that the issue of whether any award granted to ALPA would constitute general, unsecured, pre-petition claims was a core matter under the bankruptcy code. Thus, it concluded that it had jurisdiction to resolve the matter. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 1-2 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153, slip op. at 2 (order granting motion for partial summary judgment). The court then determined that the equitable remedy of seniority integration constituted a "claim" within the meaning of §101(5) of the bankruptcy code. Accordingly, the court concluded that the remedy could be converted to an award of money damages. *In re Continental Irlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 3-4 (order granting motion for partial objection to allowance of claims); In *re Continental Airlines, Inc., et al.*, No. 91-153, slip op. at 3-4 (order granting motion for partial summary judgment). Finally, the court determined that any right of payment asserted by ALPA was, at best, a general, dischargeable, unsecured claim that was entitled to no administrative priority. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 4-5 (order granting motion for partial objection to allowance of claims); *In re Continental*

Airlines Inc., et al, No. 91-153, slip op. at 5 (order granting motion for partial summary judgment).

In April, 1993, Continental's Second Amended Joint Plan

of Reorganization was confirmed by the bankruptcy court. The court's confirmation order incorporated its prior rulings from the two orders issued in February, 1993. Essentially, it clarified that any valid claims based on the LPPs would give rise to a right of payment dischargeable in bankruptcy and that no right to injunctive, equitable or other prospective relief would flow from any valid claim based on an award under the LPPs. *In re Continental Airlines, Inc., et al*, Nos. 90-932 through 90-984 (Bankr. D. Del. April, 1993) (Findings of Fact, Conclusions of Law and Order Plan of Reorganization). The court also enjoined the arbitration of the LPP dispute. Continental's plan of reorganization was consummated in late April, 1993.

C. *The ALPA/Continental Settlement*

ALPA and the LPP Claimants appealed the bankruptcy court's February and April, 1993 orders to the district court. While the appeals were pending, ALPA and Continental settled the LPP dispute. The Settlement Agreement, ultimately approved by the bankruptcy court, finally resolved all of ALPA's claims including those pursued in Continental's bankruptcy proceeding and those based on the enforcement of the LPPs in the Kasher Arbitration. Under the terms of the agreement, ALPA agreed to withdraw its appeals to the district court. The Settlement Agreement also provided an option to the "pilots formerly employed by Eastern" who were no longer represented by ALPA, and who had filed proofs of claim in the bankruptcy proceeding, to participate in the settlement. Approximately two-thirds of these pilots did so.

D. *The District Court Proceedings*

Prior to the ALPA/Continental settlement, Continental filed a motion to dismiss ALPA's and the LPP Claimants' appeals. Continental argued that the appeals from the

confirmation order were moot because: (1) the plan of reorganization had been substantially consummated; (2) it was not feasible for the plan to be undone; and (3) any

alteration to the plan's fundamental terms would be inequitable. After the settlement, Continental filed a second motion to dismiss the appeals as moot, contending that the LPP Claimants had no individual right to maintain their claims based on the LPP grievance. Thus, Continental argued, the pilots were bound by the settlement agreement.

In a comprehensive memorandum opinion, the district court addressed the issues appealed by ALPA and the LPP Claimants and presented in Continental's motions to dismiss.[6] As to the first motion to dismiss, the court concluded, *inter alia*, that ALPA's and the LPP Claimants' appeals relating to the claim for administrative priority was moot. In support of its conclusion, the court emphasized the substantial consummation of the plan. Specifically, the court noted that the investment leading to the consummation of the plan was based on an overall limit on administrative claims and a determination that ALPA and the LPP Claimants were not entitled to equitable relief. *In re Continental Airlines, Inc., et al.*, No. 93-163 (D. Del. Nov. 29, 1995). As to Continental's second motion to dismiss as moot, the court determined that it could not consider the merits of whether the LPP Claimants had standing under the LPPs to pursue seniority integration individually. Specifically, the court concluded that this issue should be determined by the arbitrator. Therefore, the court refused to dismiss their claims based on their alleged lack of standing to assert the contractual right. *Id.* at 22-25. The court also rejected Continental's argument that the LPP Claimants were bound by the ALPA/Continental settlement. *Id.* at 23.

Turning to the merits of the appeals, the court affirmed the orders of the bankruptcy court in all respects, except for the

bankruptcy court's injunction of the arbitration proceedings. *Id.* at 26-45. Relating to the injunction, the

6. Although the ALPA/Continental settlement agreement provided that ALPA would dismiss its appeal to the district court, ALPA failed to do so prior to the district court's disposition. Ultimately, ALPA did withdraw its claims against Continental. ALPA is not a party to this appeal.

court concluded that the bankruptcy court's failure to adequately set forth the reasons for the issuance of the injunction and to describe the acts restrained in its order, as mandated by Federal Rule of Civil Procedure 65(d), was fatal to the validity of the injunction. *Id.* at 34-37. Although it vacated the injunction, the district court refused to remand the matter to the bankruptcy court with instructions to strike the injunction. Rather, the court concluded that under section 1113 of the bankruptcy code, the bankruptcy court could not enjoin the arbitration even if the requirements of Rule 65(d) were met. *Id.* at 37-40.[7]

The LPP Claimants appealed the district court's order. Continental cross-appealed on the issues of the mootness of the claims and the dissolution of the injunction. On appeal, the Group of 31, a group of former Eastern pilots who previously had been represented by counsel for the LPP Claimants, have obtained substitute counsel, and have filed a separate brief. For purposes of brevity, the Group of 31 and the LPP Claimants will be referred to collectively as "the Claimants" where permissible.

The district court had jurisdiction under 28 U.S.C. § 158(a). We exercise jurisdiction of the appeal and the cross-appeal from the district court's order pursuant to 28 U.S.C. § 158(d).

II.

Our review of the district court's determination is plenary. *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988); see *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988 (2d Cir. 1990). We exercise the same review of the district court's decision as that exercised by the district court. Brown, 851 F.2d at 84. The bankruptcy court's findings of fact are reviewable only for clear error. *Id.* Legal determinations are subject to plenary review. *Id.*

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7. The court reached this issue only after determining that in spite of the invalidity of the injunction under Rule 65(d), the statutory injunction under 11 U.S.C. § 524, referenced by the bankruptcy court in its order, survived. *In re Continental Airlines, Inc., et al.*, No. 93-163, slip op. at 37. (D. Del. Nov. 29, 1995).

12.

Before we reach the merits of the parties' claims, we must address Continental's two challenges to the Claimants' appeals contending that the appeals should be dismissed. First, Continental maintains that the LPP Claimants' notice of appeal is defective for lack of adequate identification of the parties to the appeal under Federal Rule of Appellate Procedure 3(c). Next, Continental argues that the Claimants' lack standing to assert claims for individual seniority integration under the LPPs and that the appeals should be dismissed as moot.

A. *Appellate Jurisdiction*

Continental requests that the LPP Claimants' appeal be dismissed pursuant to Federal Rule of Appellate Procedure 3(c) for failure of their notice of appeal to identify each member if its group participating in this appeal. The notice of appeal filed by the LPP Claimants simply identifies the appellants as "the LPP Claimants." Continental argues that this identification is insufficient, emphasizing that a number of the LPP Claimants participated in the Continental/ALPA

settlement and, consequently, waived their claims on appeal. Continental contends that the notice of appeal did not specify those members who did not waive their claims and who are appealing from the district court's order. We reject this argument, and conclude that the LPP Claimants notice of appeal adequately identifies the appellants.

The requirements of Rule 3(c) are jurisdictional. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 320-21, 108 S. Ct. 2405, 2411, 101 L.Ed.2d 285 (1988). In *Torres*, the Supreme Court explained that permitting a court to exercise jurisdiction over parties not named in a notice of appeal would be equivalent to extending the time prescribed to file a notice of appeal, a power not granted to the court. *Id.* at 315. Thus, the failure of a notice of appeal to name a party constitutes a jurisdictional bar to the appeal, and thus a failure of that party to appeal. *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 554 (3d Cir. 1989).

Generally, rules of procedure should be liberally construed. *Torres*, 487 U.S. at 316. In *Torres*, the Supreme

Court emphasized that, "mere technicalities should not stand in the way of consideration of a case on its merits." *Id.* (internal quotations omitted). Thus, in the context of Rule 3(c), jurisdiction may be appropriate if a litigant's actions are functionally equivalent to the requirements of Rule 3(c). *Masquerade Novelty v. Unique Industries*, 912 F.2d 663, 665 (3d Cir. 1990). We have applied this construction numerous times to support a finding of jurisdiction in the absence of strict, technical compliance with the requirements of Rule 3(C). *See id.* (where the contents of documents filed within the time prescribed to file a notice of appeal contain the information required by Rule 3(c), the party will be deemed to have complied with the rule and the case will not be dismissed for lack of appellate jurisdiction); *Dura Systems,*

Inc., 886 F.2d at 554-55 (Consent Order filed by the appellants within the time prescribed to file a notice of appeal served as the "functional equivalent" of what Rule 3(c) required such that the technical failure of the actual notice of appeal was not a bar to jurisdiction); *see also In re Bertoli*, 812 F.2d 136 (3d Cir. 1987) (litigant's filing of a "Notice of Motion for Certification of An Interlocutory Appeal" in the district court within the thirty-day time period allowed to file a notice of appeal was sufficient to satisfy Rule 3(c) where the litigant failed to file an actual notice of appeal; the document communicated an intention to appeal and identified the judgment appealed from and the court to which the appeal was taken).

The purpose of Rule 3(c)'s identification requirements is to provide notice to the court and the opposing parties of the identity of the appellants. Torres, 487 U.S. at 318; *Dura Systems, Inc.*, 886 F.2d at 555. Since ALPA and the LPP Claimants filed their appeals in the district court, the LPP Claimants have been identified as a group of former Eastern pilots, no longer represented by ALPA, seeking to enforce their seniority integration rights under the LPPs. When ALPA settled its claims with Continental, both Continental and ALPA, via the settlement agreement, granted the LPP Claimants the opportunity to participate in the settlement. Continental was well aware of the individuals who elected to exercise this option. The settlement agreement specifically required those pilots

electing to participate in the settlement to execute one of two forms indicating an intent to participate in the settlement and to return the form to Continental. Those individuals who opted to settle their claims waived their right to appeal. Thus, the group of LPP Claimants dwindled to an identifiable, discrete entity made up of those individual pilots who chose not to participate in the settlement.

The term "LPP Claimants" has been subject to a common understanding among all parties to this litigation relating to the individuals comprising the group. Accordingly, we conclude that the LPP Claimants' notice of appeal sufficiently identifies the entity such that Continental, as well as this Court, is adequately apprised of the identity of the appellants such that appellate jurisdiction is proper. In so doing, we follow the Supreme Court's directive to construe Rule 3(c) liberally and to avoid a construction that would permit "mere technicalities" to bar the consideration of this case on the merits, *Masquerade Novelty*, 912 F.2d at 666 (quoting Dura Systems, 886 F.2d at 555).

B. *Whether the Claimants' Appeals are Moot.*

Continental argues that the Claimants' appeals are moot, relying on ALPA's settlement of its LPP dispute with Continental. Essentially, Continental maintains that the claim settled by ALPA was a "group" claim. Thus, Continental argues, when ALPA settled the dispute, it settled the claim on behalf of the entire group on whose behalf it filed the bankruptcy claims, including the Group of 31 and the LPP Claimants. According to Continental, then the relevant question is whether "if [individual rights to seniority integration arbitration under the LPPs] existed at all, [those] rights survived ALPA's settlement of the group grievance." In the district court, Continental challenged the LPP Claimants' individual standing under the LPPs to prosecute their rights to seniority integration. The district court declined to consider the merits of this argument, explaining that the issue constituted a "minor" dispute under the Railway Labor Act. 45 U.S.C. §§ 151-163, and was subject to the jurisdiction of the arbitrator. We conclude that because the Claimants' individual rights to prosecute their claims for seniority integration have not

been established under the LPPs, we need not address

whether the Claimants' individual rights to seniority integration survived ALPA's settlement of the dispute.

The right to seniority integration under the LPPs turns on whether a "merger" between Eastern and Continental occurred within the meaning of the LPPs. This determination depends on the meaning, interpretation and proper application of the LPPs. In turn, the issue of standing to maintain an individual claim for seniority integration under the LPPs is a "minor" dispute under the Railway Labor Act. 45 U.S.C. §§ 151-163. *See Consolidated Rail v. Labor Executives*, 491 U.S. 299, 302 (1989) ("major disputes seek to create contractual rights, minor disputes to enforce them") (*quoting Elgin, J & E. Ry. Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945) (minor disputes are those relating either to the meaning or proper application of a particular provision with reference to a specific situation)); *Chicago & Northwestern Transp. v. Local Union 214*, 829 F.2d 1424, 1427 (7th Cir. 1987). Accordingly, the issue of standing is subject to the exclusive jurisdiction of the arbitrator, and the district court properly concluded that its role relating to this issue was to protect the jurisdiction of the arbitrator board. *Consolidated Rail*, 491 U.S. at 304 ("the [National Railroad Adjustment] Board . . . has executed jurisdiction over minor disputes. Judicial review of the arbitral decision is limited."); *Chicago & Northwestern Transp.*, 829 F.2d at 1428.

Consistent with the federal courts' role relating to minor disputes, i.e., to protect the jurisdiction of the arbitration board, federal courts cannot inquire into the merits of an underlying dispute except to the extent necessary to determine its proper characterization as minor or major. Chicago & Northwestern Transp., 829 F.2d at 1428. Nor may the courts decide what remedy is appropriate if the agreement is interpreted to require recovery of a remedy. General Com of Adj., United Transp. Union v. CSX R.R., 893 F.2d 584, 592-93 (3d Cir. 1990). Thus, the district court properly concluded that it could not consider the merits of

Continental's argument that the Claimants did not have standing under the LPPs. As the Claimants' right to

prosecute their claims for seniority integration have not been established under the LPPs, we find that we need not address Continental's argument that their individual rights did not survive ALPA's settlement of the LPP dispute.

C. *Merits of the Appeal*

1. *Bankruptcy Court's Jurisdiction*

Before we determine whether the bankruptcy court properly determined the status of the Claimant's claims, we must address the Claimants' contention that the bankruptcy court did not have jurisdiction over the matter. The Claimants maintain that because the LPP dispute arose wholly outside the bankruptcy context, the matter is a "non-core" dispute over which the bankruptcy court did not have jurisdiction. The flaw in the Claimants' argument is that they confuse the disposition of the merits of the underlying LPP dispute with the treatment of their claims in bankruptcy. The bankruptcy court had exclusive jurisdiction over the latter.

A bankruptcy court has jurisdiction over all "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1) (1993); In re Wood, 825 F.2d 90, 95 (5th Cir. 1987). Section 157(b) does not define "core proceedings." However, the phrase has been interpreted to apply to those rights that are created by federal bankruptcy law:

> If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding . . . If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a

> proof of claim or an objection to the discharge of a particular debt.

In re Wood, 825 F.2d at 97. See Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990) (acknowledging the standard for "core proceedings" articulated in *Wood*).

There can be no dispute that the issue as to whether the bankruptcy claim could be satisfied by a monetary award is a "core bankruptcy matter." By filing a proof of claim against Continental's estate in bankruptcy court, the Claimants "invoke[d] the special ruled of bankruptcy

concerning objections to the claim, [and] estimation of the claim." Wood, 825 F.2d at 97. Further, the issue decided bu the bankruptcy court was how the claim would be treated in bankruptcy. Thus, the bankruptcy court was well within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claim. Our conclusion is consistent with principles that govern the disposition of issues when bankruptcy law and labor law intersect. See L.O. Koven & Brothers, Inc. v. Local Union No. 5767, 381 F.2d 196, 205 (3d Cir. 1966) ("Questions involving an interpretation of the Bankruptcy Act should be decided by the court, while questions involving an interpretation of the collective bargaining agreement should if feasible be decided by the arbitrator."); see also Garland Coal & Mining Co. v. United Mine Workers, 778 F.2d 1297, 1304 (8th Cir. 1985) ("Once the arbitrator has decided the liability issue, the case should be returned to the bankruptcy court to decide the questions of allowability and priority of claims."). Accordingly, we conclude that the bankruptcy court had jurisdiction to determine whether the Claimants' claims could be satisfied by a monetary award in lieu of specific performance.[8]

8. For the same reasons, we reject the Group of 31's efforts to invoke the Norris-La Guardia Act, 29 U.S.C. § 101. et seq., to implicate the

bankruptcy court's jurisdiction to determine how the claims will be treated in bankruptcy. Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101.

The Group of 31 contends that despite the district court's order vacating the injunction the ruling that the remedy in arbitration can be "reduced" from full seniority integration to a claim for front pay "is as clearly an injunction and interference with the Kasher arbitration as was the bankruptcy court's blanket injunction against the continuation of the arbitration." The conversion of the equitable remedy to front pay, upon successful challenge at the arbitration proceedings, only affects the

2. *Whether the Equitable Remedy Constitutes a Claim Under the Bankruptcy Code*

The LPP Claimants' and the Group of 31's primary contention on appeal is that the right to the equitable remedy of seniority integration under the LPPs cannot be converted into a claim for money damages. The Claimants emphasize that they seek specific performance under the LPPs, and they vehemently argue that the payment of money damages is not a viable alternative to the equitable right to seniority integration.

The district court rejected the Claimants' argument, holding that seniority integration under the LPPs gave rise to a "right of payment" within the definition of a "claim" under the bankruptcy code. In support of its conclusion, the district court further determined that money damages are a viable alternative to seniority integration.

The bankruptcy code defines "claim" as

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to

administration of the claim in bankruptcy. It does not operate to enjoin the arbitrator, nor does it dictate any particular remedy. Cf. Lukens. 989 F.2d at 677 (order directing an arbitrator not to preside over any newly ordered arbitration and deeming prior arbitration ineffectual involved operated as an injunction). Thus, we will not disturb the bankruptcy court's exercise of jurisdiction over the matter.

Similarly we reject the Claimants' argument that the determination whether the equitable remedy can be converted to a payment of money damages is inconsistent with the district court's conclusion that the individual right to seniority integration under the LPPs involves a "minor" dispute, subject to the exclusive jurisdiction of the arbitrator. See discussion, supra Part II.B. We discern no inconsistency between the bankruptcy court's exercise of jurisdiction to determine the status of the bankruptcy claim and the district court's characterization of the issue of the Claimants' standing under the LPPs as a "minor" dispute. The bankruptcy court's ruling related only to the matter in which the Claimants' claims in bankruptcy would be treated if a right to seniority integration is established. This ruling, unlike the standing issue, does not turn on an interpretation of the LPPs. Thus, the bankruptcy court's determination of the status of the claims and the district court's refusal to consider the merits of the standing issue was not inconsisten.

> payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). The term "claim" as defined in the bankruptcy code is construed broadly to permit debtors to meet all of their legal obligations in bankruptcy and to enable holders of claims to participate in the bankruptcy proceedings. *See Ohio v. Kovacs*, 469 U.S. 274, 279, 83 L.Ed.2d 649, 105 S. Ct. 705 (1985) ("Congress desired a broad definition of claim.")' *see, e.g., Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (debtors' obligation to pay restitution as a condition of probation which arose out of a criminal conviction for welfare fraud constituted a "debt" within the meaning of the

bankruptcy code that gave rise to a "claim" under the code).

Under section 101(5), an equitable remedy can be deemed a "claim" if that remedy "gives rise to a right of payment." We are guided as to what constitutes a "right of payment" under the bankruptcy code by the Supreme Court's analysis in Ohio v. Kovacs. In Kovacs, the petitioner, the State of Ohio, obtained an injunction ordering the respondent, William Kovacs, to clean up a hazardous waste sit. After Kovacs failed to comply with the injunction, the State obtained the appointment of a receiver, who was directed to take possession of all of Kovacs' assets and property and to clean up the waste site. Subsequent to the appointment of the receiver, Kovacs filed for bankruptcy. In response, the State filed a complaint in bankruptcy seeking a declaration that Kovacs' obligation under the injunction was not dischargeable in bankruptcy because it was not a liability on a "claim" under the bankruptcy code.

The Supreme Court held that the obligation imposed by the injunction had been converted to an obligation to pay money that was dischargeable in bankruptcy. Kovacs, 469 U.S. at 283. Critical to the Court' conclusion was it determination that the appointment of a receiver had dispossessed Kovacs of the property and therefore, had removed Kovacs' ability to cooperate with the receiver and

removes the waste from the site in compliance with the injunction. Specifically, the Court stated:

> The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets . . . and to comply with the injunction . . . . As wise as this course may have been, it dispossessed Kovacs,

> removed his authority over the site, and divested him of assets that might have been used by him to clean up the property . . . Although Kovacs had been ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs . . . Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied.

Id. at 283. Thus, the Court concluded that under the circumstances, the clean up order had been converted into an obligation to pay money. *Id.* at 283.

In In re Torwico Electronics, Inc., 8 F.3d 146 (3d Cir. 1993), we addressed the issue whether a regulatory obligation directing a Chapter 11 debtor to develop a plan to ameliorate an ongoing environmental hazard could be converted into a "claim" in bankruptcy. In that case, Torwico Electronics, a manufacturing business, filed for Chapter 11 bankruptcy and listed the New Jersey Department of Environmental Protection and Energy (the "Department") as a creditor with a disputed and unliquidated claim. After Torwico filed its petition for bankruptcy , the Department performed an on-site inspection of Torwico's property and found hazardous waste, for which it issued a notice of violation to Torwico. Two months later, the deadline for filing proofs of claim in Torwico's bankruptcy case passed. The Department had failed to file any proof of claim by this deadline.

21.

The Department, seeking to enforce Torwico's obligation under state and federal environmental laws, issued an Administrative Order requiring Torwico to submit a written closure plan for the hazardous site and assessing a monetary

penalty for failure to take action under the earlier notice of violation. The Order specifically stated: "All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment."

In bankruptcy court both parties sought summary judgment. Torwico maintained that the obligation constituted a "claim" under the bankruptcy code and that the State's failure to file a timely proof of claim was fatal to the State's position that Torwico was responsible for the obligation. The State, however, argued that the claims involved were regulatory obligations, not bankruptcy claims, and that Torwico was obligated to remedy the violations addressed in the Order pursuant to state and federal law.

Turning our attention to the Supreme Court's analysis in Kovacs, we explicitly noted that this case was unlike Kovacs in that the State was not demanding that Torwico pay money to it, but rather was requesting it to take action to ameliorate an ongoing hazard. *Torwico Electronics*, 8 F.3d at 150. Next, we shifted our focus to the nature of the obligation imposed buy the Order and concluded that it was not an order for breach of an obligation that gave rise to the right of payment. Specifically, we noted:

> The state here found that the seepage pit was a continuing problem that was leaking hazardous material into the surrounding environment. Thus, the state is not asserting a "repackaged claim for damages"; rather there is an ongoing and continuing threat and . . . an obligation on the part of the debtor to "ameliorate ongoing pollution emanating from accumulated wastes" . . . The state has no "right to payment" here. What it has is a right to force the debtor to comply with applicable environmental laws by remedying an existing hazard.

22.

Id. (quoting In re Chateauguay, 944 F.2d 997, 1008 (2d Cir.

1991)).[9]

Kovacs indicates, and *Torwico Electronics* implies, that a right of payment under the bankruptcy code is, essentially, an obligation to pay money. Thus, the issue we must decide is whether monetary payment is an alternative for the equitable remedy of seniority integration. *See Matter of Udell,* 18 F.3d 403, 407 (7th Cir. 1994) ("[an] example of a 'claim' is a right to an equitable remedy that can be satisfied by an 'alternative' right to payment"). The district court answered this question affirmatively, and we agree.

We begin our analysis by noting that here, when ALPA filed its proof of claim in bankruptcy court, it enumerated the claim as one for money damages, in addition to specific performance, arising out of the underlying LPP labor arbitration dispute. Indeed, in its supplemental pre-hearing statement filed at the arbitration, ALPA specifically noted that it sought "damages in the form of back pay and front pay against . . . Continental . . . in addition to integrated pilot positions." This is not the end of our inquiry, however. Consistent with the analyses in *Kovacs* and *Torwico Electronics*, we are compelled to examine the nature of the remedy sought and to ascertain whether it can give rise to a right of payment. We conclude that it does.

Unlike the obligation at issue in *Torwico Electronics*, seniority integration is not a remedy tailored to enforce compliance with any federal or state laws or regulations.

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9. In Torwico Electronics, we were persuaded by, and explicitly applied, the approach adopted by the Court of Appeals for the Second Circuit in *In re Chateauguay*, 944 F.2d 997 (2d Cir. 1990). In that case, the court addressed the issue of what constituted a claim in the context of the bankruptcy of an entity that operated hazardous waste sites. There, the court stated:

> Where an order imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, the order presents a claim if the government could have done the work itself and then sought reimbursement: under such circumstances there is a breach of an obligation that gives rise to a right of payment.

In re Chateauguay. 944 F.2d at 1008.

23.

The source of the remedy is a provision contained in an agreement. By its contractual nature, it is clear that the remedy was not created to enforce compliance with any particular mandate. Rather, by its terms, seniority integration is a discrete remedy, specifically created to protect a group of employees.[10] Thus, the remedy is a vehicle by which to provide a benefit or compensation to individuals who are covered by the explicit terms of the agreement and who, by the agreement's terms, are entitled to enforce the remedy.

Although the collective bargaining agreement is silent as to the remedy following a breach of the agreement, it is reasonable to conclude that a "corollary right to payment of liquidated damages" would flow from a breach giving rise to the equitable remedy under the LPPs. *See Matter of Udell*, 18 F.3d at 408 (holding that a right to an equitable remedy for breach of performance is a claim if the same breach also gives rise to a right of payment with respect to the equitable remedy or if the right of payment is an alternative to the right to an equitable remedy). *See generally Chauffeurs, Teamsters, Etc. v. Terry*, 494 U.S. 558, 108 L.Ed.2d 519, 110 S. Ct. 1339 (1990) (claim based on breach of a collective bargaining agreement is comparable to a breach of contract claim for which a legal award of money damages in the form of back pay is permitted); *Stewart v. KHD Deutz of America Corp.*, 75 F.2d 1522 (11th Cir. 1996) (breach of [collective bargaining claim] claim is most analogous to a claim for breach of contract). The Court of Appeals for the Ninth Circuit's opinion in *Van Waters & Rogers, Inc. v. Int'l Brotherhood of Teamsters*, 913 F.2d 736 (9th Cir. 1990), is instructive.

In that case, the court upheld an award of monetary damages for breach of a contract mandating seniority integration. There, Van Waters, a seller and distributor of

10. The LPPs specifically state:

> Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by (a) proposed merger . . . .

(Labor Protective Provisions. Section 1).

chemicals purchased its competitor, McKesson. Pursuant to the acquisition, Van Waters agreed to assume the terms and conditions of a collective bargaining agreement that existed between McKesson and its employees' union, Local 70. Although the collective bargaining agreement contained a seniority integration clause triggered by a purchase or sale of McKesson, Van Waters refused to honor the terms of the clause after the purchase was complete. Accordingly, Local 70 filed a grievance based on Van Waters' failure to integrate the seniority of the former McKesson employees with Van Waters' seniority list.

Arbitration of the dispute was complicated by two additional factors. First, Van Waters maintained a collective bargaining agreement with another union, Local 287. Second, the collective bargaining agreement between Local 70 and McKesson/Van Waters contained a clause precluding the arbitrator from determining any jurisdictional dispute arising between Local 70 and any other union. The effect of the latter factor was that any ruling on a jurisdictional dispute would be outside of the scope of the arbitrator's authority. As seniority integration of Local 70's employees would affect the seniority of Van Waters' employees and create a potential conflict between the two unions, resolution of the dispute implicated the arbitrator's authority to resolve the dispute.

At the arbitration hearing, the arbitrator granted Local 70's grievance demanding that the seniority of the former McKesson employees be considered as integrated. However, the arbitrator declined to enforce seniority integration to

avoid any jurisdictional dispute. Instead, the arbitrator ruled that the employees would receive damages for any wages and other benefits lost due to Van Waters' failure to consider their seniority. In so ruling, the arbitrator noted that the Local 70 agreement contained a provision that permitted the recovery of damages by employees arising out of an employer's failure to require a purchaser to assume the obligations of the collective bargaining agreement. The Ninth Circuit upheld the arbitrator's award, concluding that the arbitrator properly fashioned a monetary award to the former McKesson employees "for the breach of the terms of Local 70's collective bargaining agreement." *Id.* at 742.

25.

Van Waters illustrates that a monetary damage award can be enforced as an alternative to, or can arise with respect to, the equitable remedy of seniority integration. The award is not cumulative, nor does it address a separate remedial concern. Rather, it serves as a substitute for the performance of an equitable remedy that cannot otherwise be enforced. *See Van Waters*, 913 F.2d at 741 ("if violated, [the seniority rights provided under the collective bargaining agreement] could be remedied by an award of damages rather than specific performance.").

We find support for the proposition that monetary awards are a viable alternative to the equitable remedy for seniority integration in wrongful discharge cases where we have enforced awards of monetary damages in lieu of reinstatement. Much like reinstatement, seniority integration is a "make whole" remedy, the purpose of which is to restore the employee to the economic status quo that would exist but for the employer's conduct. See Franks v. Bowman Trans. Co., 424 U.S. 747, 766 (1976).

Although we have recognized that reinstatement is the preferred remedy to address cases of wrongful discharge, we have enforced monetary awards as a viable alternative where

reinstatement is impractical. *See Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985) (front pay is an appropriate alternative to reinstatement where the relationship between the parties may be so damaged by animosity that reinstatement is impracticable and the remedial purposes of the statute would be frustrated if front pay were not available as an alternative remedy); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir. 1984) (same); *see also Ellis v. Ringgold School District*, 832 F.2d 27 (3d Cir. 1987) (reinstatement may be denied when animosity between the parties makes such remedy impracticable). *Cf. Squires v. Bonser*, 54 F.3d 168 (3d Cir. 1994) (special circumstances indicating that tensions between the parties exceed those which normally accompany reinstatement or indicating "irreparable" animosity among the parties involved justifies denial of reinstatement).[11] Similar to the conditions that can result

11. Squires is distinguishable. That case involved an employee who challenged the district court's failure to direct reinstatement to his

from the enforcement of reinstatement, disruption to the work environment, irreparable damage to work relationships, and hostility and animosity are all very probable conditions that can result from the enforcement of seniority integration. Considering the similarity in purpose between the two remedies, the rationale underlying the enforcement of an alternative remedy to fulfill their remedial purposes, and the similarity in the impracticality of enforcing the remedies under particular circumstances, we are certain that a money damage award is an appropriate alternative to seniority integration.

Moreover, we are convinced that the particular circumstances of this case might make the enforcement of the equitable remedy of seniority integration impractical

such that an alternative money damage award would be appropriate. The seniority integration sought by the LPP Claimants and the Group of 31 could potentially result in the displacement of many Continental pilots. Such displacement has the potential to create an environment rife with hostility and low employee morale, not to mention a detrimental effect on employer-employee relations.[12] The

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former position after a jury sustained a First Amendment constitutional challenge to his employer's failure to reappoint him. Reversing the district court's decision not to reinstate the employee, we stated. "[t]he fact that reinstatement might have disturbing consequences, revive old antagonisms, or breed difficult working conditions usually is not enough to outweigh the important first amendment policies that reinstatement serves [absent] probable adverse consequences [that] weigh so heavily that they counsel the court against imposing this preferred remedy." Squires, 54 F.3d at 175 (quoting Banks v. Burkich, 788 F.2d 1161. 1165 (6th Cir. 1988)). Thus, it is clear that our decision to remand with instructions to reinstate the appellant was driven by the constitutional nature of the claims and the compelling need to enforce reinstatement to remedy the violation. As the claims here do not involve constitutional concerns, we cannot conclude that any remedy short of seniority integration will not suffice to remedy the alleged violation.

12. We note that nothing about the imposition of monetary damages as a substitute for seniority integration frustrates the remedial purpose of the LPPs. Cf. Franks, 424 U.S. at 771 (in a Title VII case, "the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible 'only for reasons which, if applied generally, would not

circumstances indicate that seniority integration would not be a feasible remedy and that an alternative remedy of monetary damages would be appropriate. Therefore, we conclude that the right to seniority integration gives rise to a "right of payment" such that the remedy constitutes a "claim" dischargeable in bankruptcy.

We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LPP

dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, we hold that any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the right to seniority integration is satisfiable by the payment of money damages.

D. *Arguments of Appellee / Cross-Appellant Continental*

1. *Dissolution of the Injunction*

Continental challenges the district court's ruling vacating the injunction against the continuation of the Kasher Arbitration on two grounds. First, it argues that contrary to the district court's conclusion, the permanent injunction, imposed by the Plan of Confirmation, complied with the mandate of Rule 65(d).[13] Next, it contends that if the

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frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."). Indeed, the LPPs set forth as its scope and purpose "to provide for compensatory allowances to employees who may be affected by the proposed merger of" the carriers. *See* discussion supra note 2. An award of monetary damages is consistent with the articulated scope and purpose, and is therefore appropriate.

13. Section 12.19 of the plan of reorganization provided:

> 12.19 *Injunction Relating to Eastern Claims.* This Joint Plan permanently enjoins, and the Confirmation Order shall constitute and provide for a permanent injunction against, any Person or entity, including without limitation. (i) any present or former employee of Eastern . . . (ii) any labor union or collective bargaining representative acting or purporting to act on behalf of any such

permanent injunction did not comply with Rule 65(d), the statutory injunction referenced in the bankruptcy court's

confirmation order survived the permanent injunction and is valid. We need not decide whether the permanent injunction failed to comply with the mandate of Rule 65(d). We conclude that even assuming that the statutory injunction survived the permanent injunction and is not subject to the requirements set forth in Rule 65(d), Continental's failure to reject the collective bargaining agreement consistent with the mandate of section 1113 of the Code renders the injunction invalid.

The Confirmation Order issued by the bankruptcy court specifically incorporated the statutory injunction prescribed by the bankruptcy code. The order states:

> In accordance with section 524 of the Bankruptcy Code . . . this Order:
>
> (ii) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt or Claim as a personal liability of the Debtors . . .

(Findings of Fact, Conclusions of Law and Order Confirming The Debtors' Revised Second Amended Joint Plan of Reorganization).

> employees or former employees . . . from commencing, conducting or continuing any suit, arbitration, action or other proceeding in any place or forum against any Debtor . . . . This injunction shall apply, without limitation, to any suit, arbitration, action or proceeding.

(Debtors' Revised Second Amended Joint Plan of Reorganization, § 12.19).

Federal Rule of Civil Procedure 65(d) states:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance: shall be specific in terms: shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . .

Fed.R.Civ.P. 65(d).

Assuming, as the district court did and as Continental argues, that the section 524 statutory injunction is not subject to the requirements of Rule 65(d), we conclude that the district court properly vacated the injunction against the Kasher Arbitration. Section 1113 of the Code provides:

> (a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

11 U.S.C. § 1113(a). The provision outlines the procedure that a debtor or appointed trustee must follow to successfully reject a collective bargaining agreement, including, but not limited to: (1) the submission of a proposal to an authorized representative of the employees affected by the terms of the agreement prior to the filing of an application to reject the agreement, 11 U.S.C. § 524(b)(1)(A); and (2) good faith attempts to reach a "mutually satisfactory modification" of the agreement, 11 U.S.C. § 524(b)(2).

The intent behind section 1113 is to preclude debtors or trustees in bankruptcy from unilaterally terminating, altering, or modifying the terms of a collective bargaining agreement without following its strict mandate. In re Ionosphere, 922 F.2d at 989-90. Moreover, the provision operates to preclude the application of other bankruptcy code provisions to the advantage of debtors and trustees to permit them to escape the terms of a collective bargaining agreement without complying with the requirements of section 1113. *See id.*

Continental does not dispute that it did not follow the requirements set forth in section 1113 to reject the collective bargaining agreement. Instead, Continental suggests that the imposition of the injunction was consistent with the bankruptcy court's authority to determine the administrative priority and status of the bankruptcy claims. Thus, it argues, section 1113 cannot

divest the bankruptcy court of jurisdiction to exercise this authority and impose the injunction. We disagree.[14]

The injunction allowed Continental to avoid its obligation to arbitrate the merger dispute under the LPPs. In *In re Ionosphere*, the Court specifically held that the application of the section 362 automatic stay provision to effectuate this result in the absence of the debtor's compliance with the requirements of section 1113 was impermissible, as "its application would allow a debtor unilaterally to avoid its obligation to arbitrate." In re Ionosphere, 922 F.2d at 993. Here, the enforcement of the statutory injunction in the face of Continental's failure to follow the requirements of section 1113 is no different. As the enforcement of the injunction would have the effect of permitting Continental to escape its duty to arbitrate under the collective bargaining agreement, we decline to enforce the statutory injunction in the absence of Continental's compliance with the requirements to reject the collective bargaining agreement.[15]

2. *Duty to Arbitrate*

Finally, we reject Continental's argument that it has no duty to arbitrate the LPP dispute. Throughout this litigation, Continental has premised its arguments on the

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14. We have not been required previously to address the applicability of arbitration under collective bargaining agreements when the employer is in bankruptcy, although the issue was raised in a case we decided last year. See Antol v. Esposto. 100 F.3d 1111. 1121 n.4 (3d Cir. 1996) ("[W]e need not decide that interesting issue here."). This case, however, requires us to do so.

15. Despite our conclusion that failure to comply with section 1113 bars an injunction of the arbitration, we reject the Claimans' contention that the substitution of a monetary damage award, in lieu of seniority integration, is not permitted under section 1113 because it alters or modifies the terms of the collective bargaining agreement. The bankruptcy court's determination of the administrative priority and status of the claims was not based on an interpretation of the LPPs. Nor did it predetermine the appropriate remedy warranted under the LPPs, thus "nullifying" the agreement and infringing on the arbitrator's jurisdiction. Substitution of the equitable remedy in no way amounts to an alteration

or termination of the terms of the collective bargaining agreement.

31.

assumption that it is bound by the LPPs and has a duty to arbitrate the LPP dispute. In so doing, Continental reaped enormous benefits: (1) it was able to obtain a ruling that the claim based on seniority integration could be treated as a right to payment in bankruptcy, satisfiable by a monetary award; and (2) in turn, it received backing from investors for its plan of reorganization, which was critical to plan confirmation by the bankruptcy court.[16] Now, Continental maintains that there has been no determination that it is bound by the LPPs and that the case should be remanded to the district court for a determination on the merits of its duty to arbitrate the dispute.

In light of overwhelming advantage that Continental derived from maintaining the position that it was bound by the collective bargaining agreement, and thus, had a duty to arbitrate the LPP dispute, we refuse to allow Continental to repudiate that representation and return to the district court to litigate the issue whether it is bound by the agreement. See EF Operating Corp. v. American Bldgs., 993 F.2d 1046, 1050 (3d Cir. 1993) ("one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so . . . a reviewing court may properly consider the representations

16. It is apparent that Continental assumed this position in efforts to obtain judicial confirmation of its plan of reorganization. In its Motion for Partial Summary Judgment, Continental stated:

> 1. [Debtors] make this Motion For Partial Summary Judgment On Their Partial Objection to Claims Based On Certain Alleged Labor Protective Provisions Involving The Air Lines Pilots Association, International ("ALPA") And Eastern Air Lines, Inc. ("Eastern") in order to ensure that they will be able to reorganize successfully and more specifically, to satisfy a condition of the Investment Agreement dated November 9, 1992 ("Investment Agreement"), by and among [the investors] an the Debtors. In addition to

> monetary damages, these claims seek to require Continental to hire several thousand Eastern Air Lines pilots, which if granted would necessitate the displacement of an equal number of incumbent Continental pilots. Debtors seek in this Motion a legal determination that the "LPP Claims" . . . are, at best, dischargeable, prepetition general unsecured claims within the meaning of the Bankruptcy Code Section 101(5).

made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations.") Accordingly, we conclude that Continental is bound by its prior representations that it has a duty to arbitrate the LPP dispute.

III.

For the foregoing reasons, we affirm the district court's decision in all respects.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	
CONTINENTAL AIRLINES, INC. Et al.,	)	Bankruptcy Court Case Nos. 90-932 through 90-984
Debtors,	)	
	)	
AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, and LPP CLAIMANTS,	)	
Appellants,	)	
v.	)	
CONTINENTAL AIRLINES, INC.	)	C.A. No.: 93-163, 93-164, 93-177, 93-178, 93-250, 93-255, 94-496
	)	Consol. 93-163 LON
Et al.,	)	
Appellees.	)	ORDER

NOW, THEREFORE, for the reasons set forth in the Court's Memorandum Opinion issued this date,

IT IS ORDERED that:

1. The appeal originally captioned 93-163 is denied, and the bankruptcy court's Order is affirmed.

2. The appeal originally captioned 93-164 is denied, and the bankruptcy court's Order is affirmed.

3. The appeal originally captioned 93-177 is denied, and the bankruptcy court's Order is affirmed.

4. The appeal originally captioned 93-178 is denied, and the bankruptcy court's Order is affirmed.

5. The appeal originally captioned 94-496 is denied, and the bankruptcy court's Order is affirmed.

6. The appeal originally captioned 93-250 and 93-255 are granted in part an denied in part. The bankruptcy court's Order of April 16, 1993, is affirmed, except the permanent injunction contained in Section 12.19 of the Plan of Reorganization is hereby vacated.

November 29, 1995
Dated

S/S: Joseph J. Longobardi, D.J.

I. FACTUAL BACKGROUND

This bankruptcy appeal involves claims against the debtor, Continental Airlines, Inc. ("Continental"), by two parties: the Air Line Pilots Association, International ("ALP") and a group of approximately six hundred former Eastern Airline Pilots ("LPP Claimants"). The claims arise out of labor protective provisions ("LPPs") included in a collective bargaining agreement executed by Eastern Air Lines, Inc. ("Eastern") and ALPA.

The collective bargaining agreement was signed at 2:45 a.m. on February 24, 1986. Eastern Air Lines v. Airline Pilots Ass'n Int'l, 670 F.Supp. 947, 949 (S.D. Fla. 1987), aff'd 861 F.2d 1546 (11th Cir. 1988). The collective bargaining agreement simply provided, "LPP's & Takeover Similar to TWA – need t work out between EAL/ALPA legal counsel." In an arbitration decision dated September 22, 1989; a panel of the Eastern-ALPA System Board of Adjustment chaired by Professor Frank Elkouri interpreted that language to encompass sections 2(a), 3, and 13 of the standard "Allegheny-Mohawk LPP's."

In accordance with those LPPs, if Eastern and another carrier were to "unify, consolidate, merge, or pool in whole or

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1. At one time, the Civil Aeronautics Board ("CAB") required merging airlines to adopt these form LPPs as a condition of approving a merger. Since deregulation, the Department of Transportation generally leaves the issue of LPPs to collective bargaining.

in part their separate airline facilities or any of the operations or services previously performed by them" in a manner affecting the seniority rights of the Eastern pilots, "provisions shall be made for the integration of seniority lists in a fair and equitable manner." Provisions for seniority integration were to have been made through collective

bargaining, but if collective bargaining failed to yield results, then the dispute was to be referred to an arbitrator selected from a panel of seven arbitrators furnished by the National Mediation Board. The LPPs further provided that the expenses of the arbitrator were to be shared equally by the carrier and either (1) the organization representing the employees or (2) if unrepresented, the employee or group of employees.

Shortly after the collective bargaining agreement between Eastern and ALPA was signed, Texas Air Corporation ("Texas Air")[2] acquired Eastern. Eastern Air Lines v. Airline Pilots Ass'n Int'l, 861 F.2d at 1548. Texas Air was Continental's corporate parent company. ALPA and the LPP Claimants allege that after Texas Air acquired Eastern, Eastern and Continental merged or combined in a way that triggered the LPPs. Continental asserts that all of the events constituting an alleged merger occurred before Continental filed for bankruptcy on December 3, 1990, while ALPA contends that the merger continued after the bankruptcy filing. (D.I. 9 at 12). ALPA

2. Since June 6, 1990, Texas Air has been known as Continental Airlines Holdings, Inc.

relies on events which occurred on February 14, 1991, to show that the merger or Eastern and Continental continued after December 3, 1990. The bankruptcy court, however, dismissed these factual allegations, first offered at oral argument, stating "Defendants have not, as required by Fed. R.Civ.P. 56(e), set forth specific facts by affidavits or as otherwise provided by the Rule showing that there is a genuine issue for trial."

Despite the requests of ALPA, Eastern and Continental refused to bargain over the integration of seniority lists.

ALPA then attempted to arbitrate the LPP dispute with the National Mediation Board. On March 9, 1989, however, Eastern had filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Eastern cited the Bankruptcy Code's automatic stay of litigation and refused to participate in the arbitration. The United States Court of Appeals for the Second Circuit held that Eastern must submit to arbitration because "[a]pplication of the automatic stay to ALPA's attempt to invoke [the arbitration] provision of the collective bargaining agreement would allow Eastern unilaterally to alter the collective bargaining agreement by avoiding its obligation to arbitrate." In re Ionosphere Clubs, Inc., 922 F.2d 984, 992-93 (2d Cir. 1990) cert. denied, 502 U.S. 808 (1991).

Continental filed a petition for Chapter 11 bankruptcy in Delaware on December 3, 1990. Subsequently, ALPA initiated an arbitration against Eastern regarding the LPP dispute before Richard R. Kasher ("Kasher Arbitration"). ALPA claimed to be

entitled to three types of damages for the alleged breach of the LPPs. (D.I. 9 at 9). ALPA sought (1) the prospective integration of seniority lists; (2) back pay from the effective date of the merger to the date of the arbitration award; and (3) front pay from the issuance of the arbitration award to the date that the Eastern pilots would complete training and begin revenue flying for Continental. The only money that may still be available to satisfy the claims for monetary relief is a reserve of unallocated stock. (See D.I. 15, Exhibit I, pp. 25-26). ALPA claims that equitable relief remains viable because Continental is once again a healthy, operating airline capable of integrating seniority lists if so ordered by an arbitrator.

On April 8, 1991, Arbitrator Kasher held a pre-hearing conference. He invited Continental, Texas Air, and others to

file brief statements of position prior to that conference. Continental filed a statement arguing that the Bankruptcy Act automatically stayed all legal proceedings, including the Kasher Arbitration, as of December 3, 1990. Thus, argued Continental, the Kasher arbitration could not proceed without the express permission of U.S. Bankruptcy Judge Helen S. Balick. (Kasher Arbitration ("KA"), op., at 20). Eastern argued that the determination of whether the LPPs had been triggered should be made by the System Board of Adjustment rather than by Arbitrator Kasher, a Section 13 LPP Arbitrator.[3] (KA at 4).

3. "Section 13 LPP Arbitrator" refers to an arbitrator appointed pursuant to Section 13 of the Allegheny-Mohawk LPPs.

Arbitrator Kasher decided that he had jurisdiction to ascertain whether Eastern and Continental had "merged", and if they had, to determine the appropriate remedies. (KA at 17, 20-21). He found that ALPA's claim did not "meet the standard indicia of a 'grievance'" which would have been submitted to the System Board of Adjustment. (KA at 20). Arbitrator Kasher found that ALPA "does not appear to have alleged, before this Arbitrator, that Eastern violated a specific term or condition in the collective bargaining agreement...." (KA at 20). Therefore, in accordance with Section 13 of the LPPs, Arbitrator Kasher asserted his jurisdiction to hear the LPP claims.

On April 16, 1993, Judge Balick entered an Order confirming Continental's Joint Second Plan of Reorganization, as Modified ("Plan of Reorganization"). The Plan of Reorganization took effect on April 27, 1993. In the Plan of Reorganization, the bankruptcy court permanently enjoined any arbitration involving the LPPs, including the Kasher Arbitration.

An important piece of the Plan of Reorganization was the investment of *$450 million dollars* into Continental. One of the conditions of that investment was a judicial determination that ALPA and the LPP claimants were not entitled to prospective relief for any breach of the LPPs. Another condition of the investment was an overall limit on administrative claims. (D.I. 15, Exhibit C). When the bankruptcy court confirmed Continental's Plan of Reorganization, it noted that the $450

million investment was "crucial to the feasibility of the [Reorganization] Plan." (D.I. 15, exhibit I).

In confirming the Plan of Reorganization, the bankruptcy court relied on orders it had entered on February 11, 1993, in which the court had found that the LPP claims were, at most, general unsecured prepetition claims which could be fully satisfied without the granting of equitable relief.[4] Neither ALPA nor the LPP Claimants moved to stay the confirmation order. While others did move for a stay, Judge Balick denied those motions. On April 27, 1993, the Plan of Reorganization was substantially consummated with the investment by Air Canada and Air Partners of $450 million, the consensual restructuring of approximately $1.7 billion of secured debt and $5.4 billion of lease obligations, and the commitment of four classes of unsecured creditors to exchange approximately $3 billion in general unsecured claims for stock in a reorganized Continental.

On March 24, 1994, ALPA and Continental settled nearly all litigation, grievances, arbitration, and bankruptcy claims that had previously been brought by ALPA ("Settlement Agreement"). The Settlement Agreement was approved by the bankruptcy court on July 19, 1994. As part of that Settlement Agreement, ALPA agreed to withdraw its appeals with prejudice.[5]

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4. Continental and ALPA had stipulated that "in making its findings concerning feasibility...the Bankruptcy Court may rely and base its findings upon its Order, dated February 11, 1993, regarding ALPA's LPP claims.

5. ALPA has not yet withdrawn its appeals.

The Settlement Agreement specifically states, however, that ALPA's waiver of its LPP claims has no effect upon "any claims or rights of any pilot who has filed a claim for such in the Delaware Bankruptcy Proceedings and does not participate in this Settlement Agreement." (D.I. 50, item 3, ¶ 8 (B)). The LPP Claimants did file claims in the Delaware bankruptcy proceedings and did not participate in the Settlement Agreement.

II. PROCEDURAL POSTURE

A. Orders

ALPA and the LPP Claimants appeal from four orders issued by the bankruptcy court. The first two orders, issued on February 11, 1993, granted partial summary judgment in favor of Continental. The first Order held that (1) ALPA's LPP claims constitute "claims" within the meaning of the Bankruptcy Code because they "can be satisfied by money damages in the form of back pay and/or front pay;" (2) "the LPP claims are, at best, general unsecured prepetition claims and are dischargeable" because the transactions relied upon by ALPA to prove the merger of Continental and Eastern occurred prior to December 3, 1990; and (3) the LPP claims are not entitled to administrative priority. ALPA and the LPP Claimants appeal from this Order. (Civ. A. 93-177 and 93-178). The second Order of February 11, 1993, restated many of the conclusions of the first Order and provided that the first Order was binding upon the LPP Claimants,

in addition to ALPA. ALPA and the LPP claimants appeal this second Order. (Civ. A. 93-163 and 93-164).

The following issues are presented by the appeals of the February 11, 1993, Orders:

(1) Whether the Bankruptcy Court has the power to determine the appropriate remedy for Continental's breach of the Labor Protective Provisions?

(2) Whether the Bankruptcy Court erred in ruling that Continental's obligation to integrate the former Eastern pilots into the Continental pilot seniority list constitutes a "claim" that is dischargeable pursuant to Section 101(5) of the Bankruptcy Code?

(3) Whether the Bankruptcy Court erred in ruling that no portion of ALPA's claim is entitled to administrative priority?

(D.I. 1.)[6].

The third Order, entered on April 16, 1993, confirmed Continental's Plan of Reorganization. The Plan of Reorganization contained a permanent injunction enjoining ALPA and the LPP Claimants from submitting the LPP dispute to arbitration. In addition, the Plan of Reorganization expressly incorporated the February 11, 1993, Orders. Both ALPA (Civ. A. 93-250) and the LPP Claimants (Civ. A. 93-255) appeal from the bankruptcy court's confirmation of the Plan of Reorganization. Because the April 16, 1993, Order incorporates the February 11, 1993, Orders, the appeal of the April 16 Order presents those same issues. In

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6. ALPA requests that the court "determine that the bankruptcy court lacked jurisdiction to determine the appropriate remedy for Continental's breach of LPPs because, pursuant to the terms of the LPPs, only an arbitrator can determine the appropriate remedy." (D.I. 9 at 6). In the alternative ALPA argues "that the future employment with seniority that

ALPA seeks constitutes a right to equitable relief that cannot be settled as a general unsecured claim." (D.I. 9 at 6).

addition, the following questions are raised: (1) whether the bankruptcy court erred by "re-adjudicating and incorporating" prior orders that were on appeal; and (2) whether the bankruptcy court erred in permanently enjoining ALPA and the LPP Claimants from arbitrating the LPP dispute. (Civ. A. 93-255, D.I. 1).

The fourth Order, issued on September 9, 1994, denied the LPP Claimants' motion for an extension of time to appeal the Bankruptcy Court's July 19, 1994, Order which approved ALPA-Continental Settlement Agreement. The bankruptcy court stated in its Order of July 19, 1994, that "[a]pproximately two-thirds of the pilots have elected to participate in the Settlement, so that the Settlement disposes of the greatest bulk of claims, and greatly reduces the costs of litigation." (Civ. A. 94-496, D.I. 9 at A-79). Furthermore, the court held, "Those who objected [to the settlement] had the clear recourse of refusing to participate in the Settlement and retaining their claims. Approximately a third of the pilots did so." (Civ. A. 94-496, D.I. 9 at A-79). On August 15, 1994, Continental notified this court, and by carbon copy the LPP Claimants, that it intended to file a motion to dismiss the appeal of the LPP Claimants on the grounds that ALPA's settlement of the underlying claims was binding upon them. (Civ. A. 94-496, D.I. 9 at A-82). For the first time, the LPP Claimants had reason to believe that their LPP claims had been settled despite their non-participation on the Settlement Agreement. On August 18, 1994, the LPP Claimants filed a motion to extend the time to file a notice of appeal. The Bankruptcy

Court denied this request. The LPP Claimants appeal that denial. (Civ. A. 94-496).

B. Motions

On May 18, 1993, Continental filed a motion to Dismiss the pending Appeals of ALPA and the LPP Claimants as moot ("First Motion to Dismiss as Moot"). In that motion, Continental asserted that because the LPP Claimants and ALPA failed to move to stay the bankruptcy court's confirmation order approving Continental's Plan of Reorganization and because parties who invested in Continental did so in reliance on the February 11 Orders which were incorporated into that confirmation order, the court cannot now grant effective relief to ALPA or the LPP Claimants. As such, Continental argues that the appeals should be dismissed as moot. (D.I. 14).

On September 12, 1994, Continental filed another motion to dismiss the appeals of ALPA and the LPP Claimants as moot.[7] In the brief accompanying that motion Continental argued that ALPA represented the LPP Claimants in the Kasher Arbitration, which was the forum in which the LPP dispute was to be decided. (D.I. 49). ALPA has settled the LPP dispute with Continental. That Settlement Agreement was approved by the bankruptcy court on July 19, 1994. Therefore, argues Continental, ALPA and the LPP Claimants no longer have standing to prosecute the LPP dispute.

7. This is the motion to which Continental had referred in its letter of August 15, 1994.

First, this court will address Continental's mootness motions. Then, each point of the appeals will be resolved seriatim.

III. DISCUSSION

A. Motions

1. First Motion to Dismiss as Moot

The issue presented by this motion is whether it is impossible or inequitable for this court to grant effective relief to the appellants. The United States Supreme Court has held that where "an event occurs while a case is pending on appeal that makes it impossible to grant 'any effectual relief whatever' to a prevailing party, then the appeal must be dismissed." Church of Scientology of Cal. v. United States, 506 U.S. 9, __, 113 S. Ct. 44V, 449 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895). This is a constitutional restriction on the power of an appellate court. A federal court has "no authority" to declare rules of law that cannot affect the matter in issue. Id. Numerous Courts of Appeals have applies Church of Scientology under the rubric of constitutional mootness. In re Best Products Co., 68 F.3d 26, 30 (2d Cir. 1995); Brooks v. Georgia State Board of Elections, 59 F.3d 1114, 1118-19 (11th Cir. 1995); Nasatka v. Delta Scientific Corp., 58 F.3d 1578, 1580-81 (Fed. Cir. 1995); National Football League Players Ass'n, 56 F.3d 1525, 1528 (D.C. Cir. 1995); In re Grand Jury Subpoenas Dated December 7 and 8, 40 F.3d 1096, 1099 (10th Cir. 1994),

cert, denied sub nom. Nakamura v. United States, 115 S.Ct. 1957 (1995).

The Third Circuit Court of Appeals has held that an appeal will be dismissed as moot when, during the pendency of an appeal, events occur which prevent the appellate court from granting effective relief. In re Joshua Slocum Ltd., 922 F.2d 1081, 1085 (3d Cir. 1990); In re Highway Truck Drivers & Helpers Local Union No. 107, 888 F.2d 293, 297

(3d Cir. 1989); In re Cantwell, 639 F.2d 1050, 1053 (3d Cir. 1981); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 150 n. 6 (3d Cir. 1986).

In the case of In re Swedeland Dev. Group, Inc., 16 F.3d 552, 559 (3d Cir. 1994), the Court of Appeals discussed "mootness predicated on statutory and prudential considerations." In a footnote, however, the court mentioned that the appeal of one of the orders "may have been moot in the district court on Article III constitutional grounds" because the court could "perceive of no relief which [could] be granted [upon] reversal." Swedeland Dev. Group, 16 F.3d at 559 n. 5. The court applied Church of Scientology, stating that an appeal is not moot if a court can fashion some form of meaningful relief, even if it is not full relief. The court noted that its decisions in Cathcart and Cantwell were in accord with Church of Scientology. See Swedeland Dev. Group, 16 F.3d at 560. In a previous decision, the Court of Appeals had ruled that the inability to grant effective relief was a constitutional barrier to the exercise of

appellate jurisdiction. See In re Abbotts Dairies of Pennsylvania, Inc., 788 F. 2d 143, 150 n.6 (3d Cir. 1986).

The Second Circuit Court of Appeals has delineated constitutional mootness from equitable mootness in the bankruptcy context. The Second Circuit has found that where no effective relief whatsoever can be granted to the prevailing party, the appeal must be dismissed by virtue of the "case or controversy" requirement of Article III of the Constitution. In re Best Products, 68 F.3d at 30. Even where relief "could conceivably be fashioned," however, the case should be dismissed as moot if to grant the relief would be inequitable. Id. (quoting In re Chateaugay Corp., 988 F.2d 322, 325 (2d Cir. 1993)). In sum, if relief is impossible, the Constitution demands dismissal of the appeal. If relief is possible but inequitable, then equity compels dismissal. See

also In re Spirtos, 992 F.2d 1004, 1006-07 (9th Cir. 1993) (appellate court must be able to fashion relief that is both effective and equitable); In re Public Serv. Co. of New Hampshire, 963 F.2d 469, 473 (1st Cir.), cert. denied sub nom. Rochman v. Northeast Utils. Serv. Co., 113 S.Ct. 304 (1992) (case may be ruled moot if, in light of intervening events, granting the requested relief would be either inequitable or impracticable).

Equitable mootness in bankruptcy proceedings "centers on the important policy favoring orderly reorganization and settlement of debtor estates by affording finality to the judgments of the bankruptcy court." In re Public Service Co. of

New Hampshire, 963 F.2d 469, 471-72 (1st Cir. 1992) (quoting In re Revere Copper & Brass, Inc., 78 B.R. 17, 23 (S.D.N.Y. 1987)). The doctrine in the bankruptcy context requires the balancing of many factors, including (1) whether substantial consummation of the bankruptcy plan[8] or a comprehensive change in circumstances has occurred; (2) whether the appellant has obtained a stay pending appeal; and (3) the nature of relief sought by appellant. In re Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977).

In addition to these factors, courts have considered whether the relief requested might have a negative effect on third parties not before the court or would affect the re-emergence of the debtor as a revitalized entity. In re Public Service Co. of New Hampshire, 963 F.2nd 469, 474 (1st Cir. 1992); In re Club Assocs., 956 F.2d 1065, 1069 n.11 (11th Cir. 1992), Matter of Block Shim Dev. Co.-Irving, 939 F.2d 289, 291 (5th Cir. 1991). In Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547, 1555 (11th Cir.), cert. denied, 488 U.S. 823 (1988),

8. Where the court cannot grant the relief requested without disturbing consummated transactions, a bankruptcy appeal will be dismissed as moot. In re Delaware and Hudson Ry. Co., 129 B.R. 388, 395 (D.Del. 1991) (J. Latchum). The Second Circuit has held that substantial consummation will not moot the appeal if (1) a court can still order some effective relief; (2) such relief will not affect the emergence of the debtor from bankruptcy as a healthy corporate entity (3) relief would not unravel intricate transactions and create an unmanageable situation for the bankruptcy court; (4) the parties adversely effected have notice of the appeal and an opportunity to participate; and (5) the appellant pursued a stay if the failure to do so created a situation in which it would be inequitable to reverse the order. In re Chateaugay, 10 F.3d 944, 952-53 (2d Cir. 1993).

the court also considered "the passage of time". One bankruptcy court thought the primary consideration to be "the relative fault of the interested parties in creating the resulting unfortunate situation." In re B. Cohen & Sons Caterers, Inc., 147 B.R. 369, 378 (Bankr. E.D.Pa. 1992). In sum, invoking the doctrine of equitable mootness requires some consideration of all these factors.

The first factor to be considered is whether substantial consummation of the bankruptcy plan or a comprehensive change in circumstances has occurred. Substantial consummation, according to the Bankruptcy Code, means:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (1) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.

11 U.S.C.A. ♣ 1101(2). The existence of substantial consummation is not the end of the inquiry, but one step in the determination of whether effective relief can be granted. In re AOV Indus., Inc., 792 F.2d 1140, 1148-49 (D.C. Cir. 1986), vacated in part on other grounds, 797 F.2d 1004 (D.C. Cir. 1986). Judge Farnan of this court has already found

substantial consummation of Continental's Bankruptcy Plan. See In re Continental Airlines, Inc., Civ. A. 93-195, D.I. 55 (D.Del. December 30, 1993) (memorandum opinion), rehearing denied, Civ. A. 93-195, D.I. 70 (D.Del. September 1994). This court agrees that the Plan of Reorganization has been substantially consummated.

The second inquiry is whether the appellant sought a stay of the order from which it appeals. An appellant has no obligation to seek a stay pending appeal. Matter of T & H Diner, Inc., 108 B.R. 448, 451-52 (D.N.J. 1989). Furthermore, the failure to obtain a stay pending appeal does not alone moot the appeal when effective relief remains available. In re Public Service Co. of New Hampshire, 963 F.2d 469, 473 (1st Cir. 1992); In re Club Assocs., 956 F.2d 1065, 1070 (11th Cir. 1992); United Merchants, 138 B.R. at 429. However, there are "a myriad of circumstances" in which obtaining a stay is necessary to preserve a party's position and avoid the progression of events and circumstances that might moot the appeal. In re Highway Truck Drivers & Helpers Local 107, 888 F.2d 293, 298 (3d Cir. 1989). Here, neither ALPA nor the LPP Claimants sought a stay of the orders from which they appeal. The Plan of Reorganization went forward and was substantially consummated.

The third aspect to the equitable balancing of interests concerns the relief requested by the parties. The appellants request several different remedies. ALPA and the LPP Claimants ask this court to find that the bankruptcy court had no jurisdiction to determine that their claims for equitable relief ruling that any damages flowing from the LPP claims are entitled to administrative priority as wages, at least to the extent that those damages represent back and front pay that would have been earned while Continental was in bankruptcy. In essence, the LPP

claimants want to take their claims to an arbitrator who would be empowered to grant both equitable and monetary relief, and then to recover any money damages that reflect post-petition back and front pay as an administrative priority.[9] This full measure of relief would jeopardize the Plan of Reorganization and could destroy the substantial post-bankruptcy progress of Continental.

The fourth step of the equity analysis requires the court to consider the potential effect of the requested relief on third parties not before the court. The relevant third parties are those who invested in Continental in reliance on the orders from which ALPA and the LPP Claimants appeal. The prevailing party may treat a bankruptcy court order as final, whether or not an appeal is pending. T & H Diner, 108 B.R. at 451-52. Thus, Continental and its investors were not wrong to rely on the orders now on appeal. In the case of In re Holywell Corp., 901 F.2d 931, 933 (11th Cir. 1990), cert. denied, Miami Center Ltd. Partnership v. Bank of New York, 498 U.S. 1041 (1991), a bank purchased property in reliance on the bankruptcy court's determination of an interest rate. The court of appeals refused to tamper with the interest rate, because it "would strike at a crucial element of the reorganization plan" on which the investor had relied. Id. At 934. Yet, investors should consider the risk that a bankruptcy order will be reversed:

9. Because the LPP Claimants are not parties to the Kasher arbitration which has been settled, the LPP Claimants would essentially be starting anew in their efforts to integrate the seniority lists.

> We conclude that all parties proceeded to implement the plan with knowledge that the

> district court's determination was subject to reversal upon appeal. Thus, although challenging the plan or seeking a stay pending appeal was preferable, tenant's failure to do so does not render this appeal moot.

In re Flagstaff Realty Assocs., 60 F. 3d 1031, 1036 (3d Cir. 1995).

In the case of In re Information Dialogues, Inc., 662 F.2d 475, 476-77 (8th Cir. 1981), the Eighth Circuit recognized the tension between providing appropriate appellate review of bankruptcy court orders and allowing reorganizations to go forward in reliance on those orders. See also, Club Assocs., 956 F.2d at 1065 (test for mootness balances "equitable considerations of finality and good faith reliance on a judgment" against "the right of a party to seek review of a bankruptcy court order"). The court in Information Dialogues held that where substantial elements of the reorganization plan have been implemented, where effective relief may not be able to be granted, and where the appellant has failed to request a stay of the confirmation order, the equities favor dismissal. Id.

Another important consideration is whether the relief requested would affect the re-emergence of the debtor as a revitalized entity. Continental has emerged from bankruptcy. The airline is doing well. Granting the requested relief could put Continental back into bankruptcy, jeopardizing the successes of the past several years.

A final consideration is whether the passage of time would make any reversal of the bankruptcy court inequitable. The orders considered in this appeal were entered well over two years ago. Continental has relied on those orders in its reorganization. Outside investors have relied on those orders in deciding to invest in Continental. In bankruptcy proceedings the passage of time often brings changed circumstances. Having neglected to move for a stay, ALPA

and the LPP Claimants cannot avoid the consequences: a substantially consummated Bankruptcy Plan built upon the reliance of third party investors.

When determining whether an appeal has been rendered moot, the district court must scrutinize each individual claim to determine whether effective relief may be granted. Matter of Andrucetti, 975 F.2d 413, 418 (7th Cir. 1992); In re AOV Indus., Inc., 792 F.2d 1140, 1149 (D.C. Cir. 1986). Hence, an evaluation of each of the issues on appeal follows.

The administrative priority claim is dismissed for mootness.[10] The $450 million investment was conditioned upon an overall limit on administrative claims and upon a judicial determination that ALPA and the LPP Claimants were not entitled to equitable relief. That investment was, in the words of the bankruptcy court, "crucial to the feasibility of the

10. To the extent that the administrative priority claim is later found not to have been moot, this court holds that the appellants' claims are not entitled to administrative priority for the reasons expressed by Judge Latchum in In re Continental Airlines, Inc., 148 B.R. 207 (D.Del. 1992).

[Reorganization] Plan."[11] To reverse the bankruptcy court on this matter could jeopardize the Plan of Reorganization and Continental's successful emergence from bankruptcy. Any relief this court might be able to fashion would be inequitable to Continental and its third party investors.

The challenge to the bankruptcy court's jurisdiction will not be dismissed as moot. An objection to subject matter jurisdiction may be raised at any time. Booth v. United States, 990 F.2d 617, 620 (Fed. Cir. 1993); Huddleston v. Nelson Bunker Hunt Trust Estate, 109 B.R. 197, 201 (N.D. Tex. 1989), aff'd, 935 F.2d 1290 (5th Cir. 1991). If the bankruptcy court had not jurisdiction, then its order is void. See Williams v. Life Sav. and Loan, 802 F.2d 1200 10th Cir. 1986). Therefore, this court must determine whether the

bankruptcy court had jurisdiction to determine that the equitable relief requested could be satisfied by a money judgment.

The question of whether the equitable right to seniority list integration gives rise to a right of payment, making it a claim in bankruptcy, is not moot. While one condition of the Settlement Agreement was a judicial

11. This fact distinguishes this case from In re AppleTree Markets, 1993 U.S. Dist LEXIS 8411 (S.D. Tex. May 24, 1993). In that case, the court found that "an explanation of how the various transactions consummated in reliance on the confirmed Plan or the survival of AppleTree as a viable business would be affected by a successful appeal of the order rejecting the CBAs" was "[n]otably absent" from the debtor's motion. Id. At *7. In the present case, a successful appeal on the issue of administrative priority would demolish a cornerstone of the Investment Agreement.

determination that the appellants were not entitled to equitable relief, the conclusion that equitable relief may be granted would not give rise to the same draconian consequences as would a finding that the LPP claims are entitled to administrative priority. If this court were to find that the right to seniority list integration did not give rise to a right of payment, then the arbitrator would be free to order the fair and equitable integration of seniority lists. In making his or her decision, the arbitrator could take into account Continental's financial condition so as to prevent a slide back into bankruptcy.[12] Because an arbitrator could structure the integration of seniority lists in a way that would not unduly risk Continental's continued progress or the investments of third parties, this court will decide whether the asserted right to seniority list integration constitutes a claim in bankruptcy.

The other issues raised on appeal are not moot. If the bankruptcy court erred by incorporating the February orders into the April order, this court would not be required to strike down the entire Plan of Reorganization, but could fashion

more limited relief. In addition, if the bankruptcy court erroneously granted

12. Continental argues that a "forced 'date of hire' seniority integration would entail up to $100 million in retraining costs" and the "displacement of thousands of Continental pilots." The court notes that this argument was made prior to the Settlement Agreement. The present consequences of seniority list integration would certainly be less drastic. In addition, the arbitrator is not required to integrate the seniority lists strictly by "date of hire". An arbitrator would be charged with integrating the seniority lists in a fair and equitable manner. If a strict "date of hire" integration scheme would be inequitable, an arbitrator would not order it.

the claimant injunction against arbitration, the remedy would be to vacate the injunction and allow arbitration to _____ light of the arbitrator's duty to achieve a fair and equitable result, the court feels confident that an arbitrator could fulfil that duty without jeopardizing the reorganization. Finally, Continental's First Motion to Dismiss as Moot does not encompass the appeal of the LPP Claimants for additional time to appeal the approval of the Settlement Agreement.

In sum, the claim for administrative priority for back and front pay which arose after Continental's petition for bankruptcy was filed is moot. All other claims survive Continental's First Motion to Dismiss as Moot.

2. Second Motion to Dismiss as Moot

The issue raised in the Second Motion to Dismiss as Moot is whether the Settlement Agreement signed by ALPA moots the LPP dispute, thereby mooting the appeal of both ALPA[13] and the LPP Claimants. Continental argues that it has settled with the only party capable of asserting the right to seniority list integration, so the LPP dispute is now moot. While the parties dispute whether ALPA represents the LPP Claimants, representation is irrelevant.[14] The issue is whether individual pilots can

13. Continental does not seek to enforce the promise made by ALPA to withdraw its appeal. This court sitting as an appellate court, will not do so sua sponte.

14. If ALPA was not the collective bargaining representative of the LPP Claimants, then it could not settle the claims of the LPP (continued...)

assert a right to seniority list integration under the collective bargaining agreement, and if so, whether the Settlement Agreement disposes of those right.

The reply brief of Continental demonstrates that the Settlement Agreement had no effect at all on the rights of the LPP Claimants:

> The settlement was plainly intended to leave individual pilots in the same position they were prior to the settlement – no better, no worse.

(D.I. 55 at 2). The language of the Settlement Agreement, and the briefs of the other parties, support this statement. Thus, Continental cannot seriously claim that the settlement mooted the appeals. Rather, Continental asserts that the seniority integration rights were group rights that could only be asserted by ALPA, and the individual LPP Claimants never had standing to bring the LPP claims.[15]

The substantive issue is, as previously noted, whether the LPP Claimants have individual rights to seniority integration under the LPPs. Before reaching that issue, however, this court must decide that it, rather than an arbitrator, has the power to

14. (...continued)
Claimants. If ALPA was the collective bargaining representative of the LPP Claimants, then while ALPA had the power to settle the claims of the LPP Claimants, the language of the Settlement Agreement makes clear that ALPA did not settle those claims.

15. Continental does not claim that the LPP Claimants have no standing on appeal. Because the second February 1993 Order specifically bound the LPP Claimants, they have standing to appeal that order.

make that determination. This depends upon whether seniority is a "major dispute" or a "minor dispute."

As stated by the Supreme Court, "major disputes seek to create contractual rights, minor disputes to enforce them." Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 302 (1989). A minor dispute relates either to the meaning or proper application of a particular provision...." Id. at 303 (quoting Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711, 723 (1945)); see also United Transp. Union v. Conemaugh & Black Lick R.R. Co., 894 F.2d 623, 628 (3d Cir. 1990) ("minor dispute concerns the meaning and application of provisions of the negotiated agreement"). The burden of showing that a dispute is minor is "relatively light." General Comm. of Adjustment, United Transp. Union, Western Maryland Ry. Co. v. CSX R.R. Co., 893 F.2d 584, 591 (3d Cir. 1990). When in doubt, courts construe the dispute as minor. Id.; Air Line Pilots Ass'n v. Eastern Air Lines, 869 F.2d 1518, 1521-22 (D.C. Cir. 1989); Chicago & north Western Transp. Co. v. International Bhd. of Elec. Workers, Local Union No. 214, 829 F.2d 1424, 1428-29 (7th Cir. 1987).

The LPP dispute is a minor dispute. The controversy involves whether the Eastern and Continental have "merged" within the meaning of the LPPs which are part of the collective bargaining agreement. A district court's role in minor disputes is limited to protecting the jurisdiction of the arbitration board. Chicago & North Western Transp. Co. v. International Bhd. of Elec. Workers, Local union No. 214, 829 F.2d 1424, 1428 (7th

Cir. 1987). The federal court cannot consider the merits of the underlying dispute or the remedy that might be appropriate. General Comm. of Adjustment, United Transp. Union v. CSX Railroad Co., 893 F.2d at 592-93; Air Line Pilots Ass'n v. Eastern Air Lines, 869 F.2d at 1518, 1521 (D.C. Cir. 1989).

The issue of whether the LPP Claimants have individual rights to seniority integration under the LPPs is not properly before this federal district court.[16] Therefore, this court will not dismiss the claims of the LPP claimants based on their alleged lack of standing to assert the contractual right to seniority integration.[17]

B. Standard of Review

The bankruptcy court's conclusions of law are subject to de novo review. Meridian v. Alten, 958 F.2d 1226, 1229 (3d Cir. 1992); Matter of Spencer, 115 B.R. 471, 473 (D.Del 1990). The factual findings of the bankruptcy court may not be set aside

16. Jurisdiction may lie with an adjustment board in accordance with its normal jurisdiction over minor disputes, or jurisdiction may lie with a Section 13 LPP Arbitrator as provided by the LPPs. The issue of which of those two fora is appropriate is not properly raised in this appeal.

17. There is administrative precedent for the proposition that the LPP Claimants may individually assert their seniority rights. See, e.g., In re North Central-Southern Merger Case, 82 C.A.B. 1, 1979 WL 21508, *63, Orders 79-6-7, 79-6-8 (May 15, 1979) ("labor protective provisions represent a formula for protecting individual employees" from hardships involved with merger. "The spouses as individuals are clearly entitled to the benefit of the labor protective conditions").

unless clearly erroneous. Bankruptcy Rule 8013; Landon v. Hunt, 977 F.2d 829, 830 (3d Cir. 1992).

C. Merits of the Appeals

1. Jurisdiction of Bankruptcy Court

ALPA and the LPP Claimants argue that the Bankruptcy Court did not have the power to determine that the LPP claims could be satisfied by monetary awards rather than by specific performance directing the equitable integration of the Eastern and Continental seniority lists. The appellants claim that the collective bargaining agreement provided for such decisions to be made by an arbitrator from the National Mediation Board.

As an initial matter it must be noted that the Bankruptcy Court did not hold that ALPA and the LPP Claimants were not entitled to equitable relief. Rather, the court held that any right to equitable relief could be reduced to money damages as an alternative to specific performance. Contrary to ALPA's assertions, the Bankruptcy Court did not encroach upon the jurisdiction of the arbitrator to determine an appropriate remedy for a breach of the LPPs. The bankruptcy court simply decided that any equitable remedy could be reduced to a right of payment, thereby making the right to seniority list integration a "claim" in bankruptcy.

This was within the jurisdiction of the Bankruptcy Court. The determination of whether the right to the integration of seniority lists is a "claim" under 11 U.S.C. ♣ 101(5) (B) is a

"core" bankruptcy matter. See 28 U.S.C. ♣ 1334; 28 U.S.C. ♣ 157; In re Leco Enters., Inc., 144 B.R. 244, 248 (S.D.N.Y. 1992) (cases arising under Title 11 are "at the core of the jurisdiction of the bankruptcy courts"). It arises directly under the Bankruptcy Code. There can be no question, therefore, that the Bankruptcy Court properly exercised its jurisdiction.

2. "Claim" Under Section 101(5)

Having decided that the Bankruptcy Court properly exercised its jurisdiction to determine that the alleged right to seniority list integration was a claim under 11 U.S.C. ♣ 101(5), the court must now determine whether the Bankruptcy Court's decision on that issue was correct.

The United States Code defines the term "claim" in bankruptcy, in relevant part, as a "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, immature, disputed, undisputed, secured or unsecured." 11 U.S.C. ♣ 101(5) (B). This language has been interpreted to be the "broadest available definition" of that term. Johnson v. Home State Bank, 501 U.S. 78, 82 (1991); Matter of Udell, 18 F.3d 403, 406 (7th Cir. 1994). The essential question is whether the right to the integration of seniority lists gives rise to a "right of payment." The Supreme Court has stated that a "right to payment" is nothing more than an enforceable obligation. Pennsylvania

Dep't of Public Welfare v. Davenport, 495 U.S. 552, 559 (1989) (holding that the obligation to make restitution payments for welfare fraud falls within definition of claim)."

The major Supreme Court case elucidating the term "right to payment" is Ohio v. Kovacs, 469 U.S. 274 (1985). In that case the state sought "money to defray [environmental] cleanup costs" in lieu of the enforcement of an injunction ordering the cleanup. Id. at 279, 283. The court found that the injunction gave rise to a right to payment. Id. at 283. Here, ALPA and the LPP Claimants want more than just money. They want the actual equitable integration of the seniority lists, as well as back pay and front pay during a period of retraining.

Courts have taken several divergent approaches in the interpretation of Kovacs.[19] One court has interpreted Kovacs

to mean that "[i]f an expenditure of money is required to perform the obligation, then the affirmative duty gives rise to a 'claim'...." In re May 141 B.R. 940, 943 (Bankr. S.D.Ohio 1992).[20] The Fifth Circuit has explained that the definition of

18. While the result of Davenport was overruled by the Criminal Victims Protection Act of 1990, the rationale of the decision remains unscathed. Johnson, 501 U.S. at 83-84 n.4.

19. At least one court has ignored Kovacs. See In re Blue Diamond Coal Co., 147 B.R. 720 (Bankr. E.D. Tenn. 1992), aff'd, 160 B.R. 574 (E.D. Tenn. 1993). There the court held that "[b]ecause the Union may sue to enforce the terms of the Agreement outside of bankruptcy, it has a 'right to payment' sufficient to support a claim in bankruptcy." Clearly, this is not the appropriate test.

20. This is an overly simplistic reading of Kovacs. In Kovacs, the Court emphasized that Ohio was not attempting to get Kovacs

(continued...)

"claim" is "designed to cause the liquidation of contingent claims for money damages that are alternatives to equitable remedies." Matter of Davis, 3 F.3d 113, 116 (5th Cir. 1993). One example of a right to an equitable remedy that gives rise to a right to payment is a right to specific performance with an alternative right to damages. See Kovacs 469 U.S. at 280 (quoting legislative history); In re Perry, 131 B.R. 763, 766 (Bankr. D. Mass. 1991).

The Seventh Circuit Court of Appeals found that in addition to when damages are an "alternative" to the right to an equitable remedy, the right to payment "must at least arise 'with respect to' the equitable remedy, not apart from it." Matter of Udell, 18 F.3de at 407. According to the Seventh Circuit, the focus is on whether equitable and monetary remedies address "entirely separate remedial concerns." Id. at 409. If so, then the equitable remedy does not give rise to

the monetary remedy. Id. Finding that a stipulated damages clause and an injunction requiring Mr. Udell not to compete with his former employer gave rise to separate remedial concerns with no "derivative relationship," the court held that the injunction was not a claim. Id. at 409.

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20. (...continued)
to personally clean up the property, but was simply seeking money for the remediation. Such a distinction would be irrelevant under the rationale of May, because Kovacs would have had to expend money either to personally clean up the property or to pay the state.

The Third Circuit addressed the interpretation of "right to payment" in the case of In re Torwico Elecs., Inc., 8 F.3d 146, 150 (3d Cir. 1993), cert. denied sub nom. Torwico Elecs., Inc. v. New Jersey Dep't of Environmental Projection and Energy, 114 S.Ct. 1576 (1994).[21] The Court of Appeals rested its decision upon the distinction between environmental enforcement efforts that can be fulfilled through the payment of money and those that cannot. The court explained that a prospective obligation to clean up hazardous waste did not constitute a claim in bankruptcy where the debtor "had no option to pay for the right to allow its wastes to continue to seep into the environment." Id. at 151 n. 6; see also, In re Chateaugay, 944 F.2d 997, 1009 (2d Cir. 1991) (to the extent that CERCLA affords a right to payment in lieu of an order directed solely at cleanup, such an order is a claim); United States v. Hubler, 117 B.R. 160, 165 (W.D. Pa. 1990), aff'd, 928 F.2d 1131 (3d Cir. 1991) (plaintiff did not and cannot convert defendants' obligations into monetary liability so they are not "claims"). The equitable right to environmental remediation could not be exchanged for a right of monetary payment.

The relevant question here is whether monetary damages are a viable alternative to the actual integration of the Eastern

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21. In that decision, the Third Circuit marginalized, relative to the issues in this appeal, its decision in Penn Terra Ltd. V. Department of Environmental Resources, 733 F.2d 267 (3d Cir. 1984). The court distinguished Penn Terra as addressing the automatic stay provisions of ♣ 362 rather than the definition of claim under ♣ 101(5). See Torwico, 8 F.3d at 150 n.2.

and Continental seniority lists. If Continental's obligation to integrate seniority lists can be converted into a monetary liability (i.e. damages for the alleged breach of the collective bargaining agreement rather than specific performance), then it is a "claim"." All appropriate remedies are available to enforce violations of the Railway Labor Act. CSX Transp. Inc. v. Marquar, 980 F.2d 359, 365 (6th Cir. 1992). Indeed, money damages for violations of the Railway Labor Act were regarded as a proper judicial remedy prior to the remedy of reinstatement. See Brady v. Trans World Airlines, Inc., 401 F.2d 87, 102-03 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969). While this case involves not so much a violation of the Railway Labor Act as a breach of a collective bargaining agreement under the Railway Labor Act, a monetary remedy is not precluded.

Courts generally view front pay as an "alternative" to reinstatement. See Goss v. Exxon Office Sys. Co., 747 F.2d 885, 890 (3d Cir. 1984) ("future lost earnings in Title VII cases is an alternative to the traditional equitable remedy of reinstatement"); see also, Seymour v. Olin Corp., 666 F.2d 202, 211 (5th Cir. 1982) (prospective damages may be granted if reinstatement is impractical); Soto Segarra v. Sea-Land Serv., Inc., 581, F2d 291, 287 (1st Cir. 1978) (same); de Arroyo v. Sindicato De Trabajadores Packing, AL-CIO, 425 F2d 281, 292 (1st Cir. 1970), cert. denied sub nom. Puerto Rico Telephone Co. v. de Arroyo, 400 U.S. 877 (1970) (same).

There is no persuasive reason to distinguish the equitable remedy of seniority list integration from the equitable remedy of reinstatement. A wrongful denial of seniority in a merged airline is wholly analogous to wrongful discharge. Both deprive employees of jobs that rightfully belong to them. Front pay can be an alternative remedy for both. In sum, this court holds that front pay is an alternative remedy to seniority list integration.[22] Therefore, the Bankruptcy Court did not err when it held that the right to seniority list integration gave rise to a right of payment and, as such, is a "claim" within the meaning of 11 U.S.C. ♣ 101 (5) (B).

3. Incorporating Appealed Orders Into New Order

ALPA questions whether the incorporation of the February 11 Orders into the April 16 Order constitutes a violation of res judicata. ALPA argues that the February 11 Orders were final judgments on the merits of the LPP claims, so that res judicata barred any subsequent action involving the same claim, "prohibiting either Continental or ALPA from relitigating the underlying merits before the bankruptcy court." Thus, ALPA reasons that no new judgment on the same matter could issue from the bankruptcy court. (D.I. 30 at 16-20)

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22. Furthermore, the right to damages arises "in respect to" the integration of seniority lists. See Matter of Udell, 18 F.3d at 407. If there is no right to the integration of seniority lists, then there is no right to back pay and limited front pay. The money damages are "derivative" of the equitable remedy.

which these appeals were taken, counsel for Continental assumed that Continental was bound by and breached the LPPs. The LPPs were included in the collective bargaining agreement. Therefore, counsel for Continental assumed that Continental was bound by and breached a section of the Eastern-ALPA collective bargaining agreement.

Continental argues that ♣ 1113 applies only when there is a collective bargaining agreement and an ongoing collective bargaining relationship. (D.I. 35 at 21). Continental asserts that ALPA has conceded in the past that "the LPP Claims do not involve a collective bargaining agreement, a bargaining relationship, or the imposition of the 'terms and conditions' of the Eastern-ALPA collective bargaining agreement on Continental." (D.I. 35 at 22). This wholly misstates ALPA's contentions. The LPP claims do involve a collective bargaining agreement. The Eastern-ALPA collective bargaining agreement has been interpreted to include the LPPs. ALPA does not claim that the Eastern-ALPA collective bargaining agreement is applicable to the relationship between Continental and the Continental pilots.[26] Rather, ALPA contends that as the carrier with whom Eastern allegedly merged, Continental has a duty to integrate its pilot seniority list with that of Eastern. There is at least some precedent for this argument. See National Airlines Acquisition, Arbitration, 95 C.A.B. 584, 1982 WL 35318 at *1 (April 15, 1982) ("pursuant to

26. As a result, Continental's argument that bargaining with ALPA over seniority list integration would be "impossible, and even unlawful" is not well taken.

section 3, the surviving carrier of an acquisition or merger and the effected employees...are responsible for integrating seniority lists").

Assuming that Continental had this duty, as Continental assumed below, the question is whether the rejection of this duty must be achieved through the provisions of 11 U.S.C. ♣ 1113. It is undisputed that Continental's alleged duties to integrate seniority lists and to arbitrate the dispute if bargaining was unsuccessful arise from the LPPs. It is also undisputed that the LPPs have been interpreted to be a part

of the Eastern-ALPA collective bargaining agreement. To the extent that Continental seeks to abrogate its responsibilities under the collective bargaining agreement, it must do so in accordance with the procedures of the Bankruptcy Code, specifically ♣ 1113.

Continental argues, however, that even if ♣ 1113 does apply to the current controversy (and it does), ♣ 1113 cannot be interpreted as a partial implied repeal of the "provisions of the Code empowering a bankruptcy court to rule on the status of the claims against a debtor."[27] Continental's argument is not accepted. To the extent that provisions of the Bankruptcy Code conflict with ♣ 1113, the plain language of ♣ 1113 controls:

27. Because Continental does not identify the statutory provisions allegedly in jeopardy of implied partial repeal, it is exceedingly difficult to evaluate its arguments.

> No provision of this title shall be construed to permit a trustee[28] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. ♣ 1113(f). "Subsection 1113 (f) evinces an intent that other provisions of the Bankruptcy Code are inoperable to the extent that they allow a debtor to bypass the requirements of ♣ 1113". In re Ionosphere Clubs, Inc., 922 F.2d 984, 989 (2d Cir. 1990). Because Continental's alleged duties to integrate seniority lists upon merger and to arbitrate disputes about seniority integration arise from the collective bargaining agreement and because the collective bargaining agreement has not been rejected in accordance with the provisions of ♣ 1113, those obligations remain intact.

Having decided that Continental has a duty to arbitrate the LPP dispute, under the assumption that Continental was

bound by the LPP provisions, the question becomes whether the Bankruptcy Court could properly enjoin that arbitration.[29] The case of In re Ionosphere, Inc., 922 F.2d 984 (2d Cir. 1990) is instructive. That case involved the same LPPs at issue in the present case. The Second Circuit found that

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28. The term "trustee" as used in ♣ 1113(f) includes a debtor in possession. See 11 U.S.C. ♣ 1113(b) (1) (Thereinafter in this section 'trustee' shall include a debtor in possession").

29. This court has already found that the Bankruptcy Court did not effectively enjoin the arbitration because the injunction did not comply with Fed.R.Civ.P. 65(d). The court is now considering whether upon remand the Bankruptcy Court could properly enter an injunction prohibiting arbitration of the LPP dispute.

> adjudication of this dispute in the bankruptcy court would nullify effectively the arbitration clause in the collective bargaining agreement and would substitute the court's judgment for that of the arbitrator.
>
> The collective bargaining agreement expressly provides for arbitration as the method of dispute resolution.

Id. at 992. The bankruptcy court does have jurisdiction to decide the merits of the LPP claims. See 28 U.S.C. ♣ 157. Yet, exercise of that jurisdiction would abrogate the provision of the collective bargaining agreement that mandated arbitration. Therefore, the bankruptcy court should have allowed an arbitrator to determine the merits of the LPP claims against Continental.[30] This in no way restricts the bankruptcy court's authority to determine the priority of those claims. Any arbitration award would be, in accordance with the bankruptcy court's determination, a general unsecured pre-petition claim.[31]

The appropriate remedy under these circumstances is to vacate the injunction, which this court hereby orders. See Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 353 F.2d

30. The court does not imply that an arbitrator should reach any particular decision. In fact, an arbitrator may decide not to reach a decision on the merits. See, e.g., seaboard Acquisition, 1983 WL 35470 (C.A.B. December 15, 1983) (dismissing seniority integration petition for delay in bringing claim).

31. The court realizes that the right to arbitrate LPP dispute may be of limited practical utility to the LPP Claimants. Any award that might be granted by the arbitrator would be an unsecured pre-petition claim and may come after the assets of the bankruptcy estate have been wholly depleted. While there was some evidence in the record of a reserve of unallocated stock (D.I. 15, Exhibit I, pp. 25-26), there is no evidence that such a reserve still exists or that it would exist at the time such an arbitration award might be granted.

510 (3d. Cir. 1965) (vacating injunction and remanding to district court for proceedings consistent with opinion); Mayflower Indus. v. Thor Corp., 182 F.2d 800, 801 (3d Cir. 1950) (dissolving injunction): Alberti v. Cruise, 383 F.2d 268, 272 (4th Cir. 1967) (remaining to district court with directions to vacate injunction); see also, Hartford-Empire Co. v. United States, 323 U.S. 386, 410, supplemented, 324 U.S. 570 (1945) (approving the elimination of section of injunction enjoining violations "as charged in complaint"); Louis W. Epstein Family Partnership v. Kmart Corp., 13 F.3d 762, 772 (3d Cir. 1994) (remaining to district court with instructions to strike from injunction an indefinite catch-all provisions);[32] but see, Manges, 900 F.2d at 800 (remanding to district court with instructions to reform the injunction); Mitchell v. Seaboard System R.R., 883 F.2d 451, 454 (6th Cir. 1989) (drafting injunction and remanding to district court for its entry). To do any less than vacate the injunction

would disregard the important public policies served by Rule 65(d) as articulated by Judge Wyzanski in H.K. Porter Co. v. National Friction Prods. Corp., 568 F.2d 24 (7th Cir. 1977). There is no need to remand this matter to the bankruptcy court because (1) the injunction is invalid under Fed.R.Civ.P. 65(d) and is hereby vacated and (2) the bankruptcy court may not, in light of ♣ 1113, enjoin the arbitration even if a new injunction met the requirements of Fed.R.Civ.P. 65(d).

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32. The court notes that the Third Circuit in Epstein Family Partnership did not remand for a more explicit or definite statement of prohibited activity.

5. Extension of Time to Appeal From Settlement

On September 9, 1994, the bankruptcy court denied the LPP Claimants' August 18, 1994, motion to extend the time to appeal the bankruptcy court's July 19, 1994, Order approving the Settlement Agreement of ALPA and Continental. The issue is whether the bankruptcy court erred in refusing to extend the time for the LPP Claimants to file an appeal.

In accordance with Bankruptcy Rule 8002(c), the bankruptcy court "may" extend the time for filing the notice of appeal for a period not to exceed 20 days form the expiration of time otherwise prescribed. The request for an extension must come within the 10 days allotted for filing the appeal. If within 20 days after the expiration of those 10 days a party can show "excusable neglect" for failing to provide notice of appeal, then the appeal may be allowed. Because the LPP Claimants moved for an extension of time within 20 days after the expiration of the original 10 day period, the bankruptcy court was permitted to grant the extension of time if the LPP Claimants showed excusable neglect.

The parties agree that this court reviews the denial of an extension of time to appeal for an abuse of discretion. See Manhattan-Ward, Inc. v. Grinnell Corp., 490 F2d 1183, 1186 (2d Cir. 1974); Linder v. Trump's Castle Assocs., 155 B.R. 102, 104 (D.N.J. 1993); In re Cordry, 149 B.R. 970, 976 (D.Kan. 1992); (Civ. A. 94-496, D.I. 8 at 3 and D.I. 11 at 3).

In the Order approving the Settlement Agreement the bankruptcy court ruled:

> Continental is authorized to accept further elections by eligible pilots to participate in the Settlement Agreement for a period of sixty (60) days from the date of this Order, such further elections shall be treated as timely in all respects for all purposes under the Settlement Agreement. All other time periods or deadlines contained in the Settlement are also hereby extended by sixty (60) days.

The LPP Claimants interpreted this language as not only expanding the time by which an eligible pilot could decide to participate in the Settlement Agreement but also as expanding the period for an eligible pilot to appeal the Order approving the Settlement Agreement (Civ. A. 94-496, D.I. 8 at 6)

In denying the motion for an extension of time, Judge Balick stated that the court did not extend the deadline for appeal by sixty days and, in fact, was not empowered to do so. (Civ. A. 94-496, D.I. 9 at A-117). Furthermore, the bankruptcy court found that "the neglect is not excusable" and that there would be "prejudice to the debtor and to the unsecured creditors." (Civ. A. 94-496, D.I. 9 at A-110).

The bankruptcy court did not abuse its discretion in denying the request for an extension of time to appeal. It fully considered the arguments of counsel, balanced the relevant factors and found that the actions of the LPP Claimants did not constitute excusable neglect. This court

agrees with the bankruptcy court that the Order approving the Settlement Agreement cannot fairly be read to expand the time for appeal.

44.

Rather, it expanded the time for pilots to decide whether or not to participate in the Settlement Agreement. Therefore, the appeal of the LPP Claimants in Civ. A. 94-496 is denied. The LPP Claimants may not appeal the Order approving the Settlement Agreement.

IV. CONCLUSION

The decisions of the bankruptcy court are affirmed in part and reversed in part. The appeals originally captioned Civ. A. 93-163, 93-164, 93-177, 93-178, and 94-496 are denied, and the bankruptcy court is affirmed. The appeals originally captioned 93-250 and 93-255 are granted in part and denied in part.

The permanent injunction contained in Section 12.19 of the Plan of Reorganization is vacated. Otherwise, the bankruptcy court's orders of February 11, 1993; April 16, 1993; and September 9, 1994, are affirmed.

45

RAILWAY LABOR ACT

TITLE 45 - United States Code
Sections 151-188

151. Definitions; short title

When used in this chapter and for the purposes of this chapter-

First. The term "carrier" includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of title 49, United States Code, as of December 31, 1995, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, Or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being

engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefore, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Surface Transportation Board shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations

be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Board.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

(May 20, 1926, ch. 347, § 1, 44 Stat. 577; June 7, 1934, ch. 426, 48 Stat. 926; June 21, 1934, ch. 691, § 1, 48 Stat. 1185; June 25, 1936, ch. 804, 49 Stat. 1921; Aug. 13, 1940, ch. 664, §§2, 3, 54 Stat. 785, 786; June 25, 1948, ch. 646, §32(a), (b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "this Act", meaning act May 20, 1926, ch. 347, 44 Stat. 577 ' as amended, known as the Railway Labor Act, which enacted this chapter and amended sections 225 and 348 of former Title 28, Judicial Code and Judiciary. Sections 225 and 348 of former Title 28 were repealed by section 39 of act June 25, 1948, ch. 646, 62 Stat. 992, section 1 of which enacted Title 28, Judiciary and Judicial Procedure. Section 225 of former Title 28 was reenacted as sections 1291 to 1294 of Title 28. For

complete classification of this Act to the Code, see this section and Tables.

CODIFICATION

In par. First, "subtitle IV of title 49" substituted for "the Interstate Commerce Act [49 U.S.C. 1 et seq.]" on authority of Pub. L. 95-473, §3(b), Oct. 17, 1978, 92 Stat. 1466, the first section of which enacted subtitle IV of Title 49, Transportation.

Provisions of act Aug. 13, 1940, §2, similar to those comprising par. First of this section, limiting the term "employer" as applied to mining, etc., of coal, were formerly contained in section 228a of this title. Provisions of section 3 of the act, similar to those comprising par. Fifth of this section, limiting the term "employee" as applied to mining, etc., of coal, were formerly contained in sections 228a, 261, and 351 of this title, and section 1532 of former Title 26, Internal Revenue Code, 1939.

As originally enacted, par. Seventh contained references to the Supreme Court of the District of Columbia. Act June 25, 1936 substituted "the district court of the United States for the District of Columbia" for "the Supreme Court of the District of Columbia", and act June 25, 1948, as amended by act May 24, 1949, substituted "United States District Court for the District of Columbia" for "district court of the United States for the District of Columbia".

As originally enacted, par. Seventh contained references to the "circuit court of appeals". Act June 25, 1948, as amended by act May 24, 1949, substituted "court of appeals" for "circuit court of appeals".

As originally enacted, par. Seventh contained references to the "Court of Appeals of the District of Columbia". Act June 7, 1934, substituted "United

States Court of Appeals for the District of Columbia" for "Court of Appeals of the District of Columbia".

AMENDMENTS

1940-Act Aug. 13, 1940, inserted last sentence of par. First, and second par. of par. Fifth. 1934-Act June 21, 1934, added par. Sixth and redesignated provisions formerly set out as par. Sixth as Seventh.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 157, 182 of this title.

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter-, (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

(May 20, 1926, ch. 347, §2, 44 Stat. 577; June 21, 1934, ch. 691, §2, 48 Stat. 1186.)

AMENDMENTS

1934-Act June 21, 1934, reenacted provisions comprising this section without change.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 153, 157 of this title.

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by . the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining, freedom from interference by carrier, assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work there for, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the

manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board;. secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate

method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for

the expenses of the courts of the United States: Provided, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and as assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor

organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to

membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

(May 20, 1926, ch. 347, § 2, 44 Stat. 577; June 21, 1934, ch. 691, § 2, 48 Stat. 1186; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Jan. 10, 1951, ch. 1220, 64 Stat. 1238.)

REFERENCES IN TEXT

The effective date of this chapter, referred to in par. Fifth, probably means May 20, 1926, the date of approval of act May 20, 1926, ch. 347, 44 Stat. 577.

AMENDMENTS

1951-Act Jan. 10, 1951, added par. Eleventh. 1934-Act June 21, 1934, substituted "by the carrier or carriers" for "by the carriers" in par. Second, generally amended pars. Third, Fourth, and Fifth, and added pars. Sixth to Tenth.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, substituted "United States attorney" for "district attorney of the United States". See section 541 of Title 28, Judiciary and Judicial Procedure, and Historical and Revision Notes there under.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 153, 157 of this title; title 29 section 2101.

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall

be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party

designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This Division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly

engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including -cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided (l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division

members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any

division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its Consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names,

salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting

through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with

the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named.

Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

(May 20, 1926, ch. 347, §3, 44 Stat. 578; June 21, 1934, ch. 691, §3, 48 Stat. 1189; June 20, 1966, Pub. L. 89-456, §§I, 2, 80 Stat. 208, 209; Apr. 23, 1970, Pub. L. 91-234, §§ 1-6, 84 Stat. 199, 200.)

AMENDMENTS

1970-Par. First, (a). Pub. L. 91-234, § 1, substituted "thirty-four members, seventeen of whom shall be selected by the carriers and seventeen" for "thirty-six members, eighteen of whom shall be selected by the carriers arid eighteen".
Par. First, (b). Pub. L. 91-234, §2, provided that no carrier or system of carriers have more than one voting representative on any division of the National Railroad Adjustment Board.
Par. First, (c). Pub. L. 91-234, §3, inserted "Except as provided in the second paragraph of subsection (h) of this section" before "the national labor organizations", and provided that no labor organization have more than one voting representative on any division of the National Railroad Adjustment Board.
Par. First, (h). Pub. L. 91-234, § 4, decreased number of members on First division of Board from ten to eight members, with an accompanying decrease of five to four as number of members of such Board elected respectively by the carriers and by the national labor organizations satisfying the enumerated requirements, and set forth provisos which limited voting by each labor organization or carrier member in any proceedings of the division or in adoption of any award.
Par. First, (k). Pub. L. 91-234, §5, inserted "except as provided in paragraph (h) of this section" after proviso.

Par. First, (n). Pub. L. 91-234, §6, inserted "eligible to vote" after "Adjustment Board".
1966–Par. First, (m). Pub. L. 89-456, §2(a), struck out except insofar as they shall contain a money award" from second sentence.
Par. First, (o). Pub. L. 89-456, §2(b), inserted provision for a division to make an order to the petitioner stating that an award favorable to the petitioner should not be made in any dispute referred to it.
Par. First, (p). Pub. L. 89-456, §2(c), (d), substituted in second sentence "conclusive on the parties" for "prima facie evidence of the facts therein stated" and inserted in last sentence reasons for setting aside orders of a division of the Adjustment Board, respectively.
Par. First, (q) to (x). Pub. L. 89-456, §2(e), added par. (q) and redesignated former pars. (q) to (w) as (r) to (x), respectively.
Par. Second. Pub. L. 89-456, §1, provided for establishment of special adjustment boards upon request of employees or carriers to resolve disputes otherwise referable to the Adjustment Board and made awards of such boards final.
1934-Act June 21, 1934, amended provisions comprising this section generally.

FEDERAL RULES OF CIVIL PROCEDURE

Costs, see rule 54 and notes of Advisory Committee under the Rule, Title 28, Appendix, Judiciary and Judicial Procedure.
Federal Rules of Civil Procedure as governing the procedure in all suits of a civil nature whether cognizable as cases at law or in equity, see rule 1.
Mandamus as abolished but relief yet available by appropriate action or motion under Federal Rules of Civil Procedure, see rule 81 and Notes of Advisory Committee under the rule.
One form of action, see rule 2.
Pleadings allowed, see rule 7.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 154, 157, 181, 182, 184, 185, 441, 588, 797c, 797h, 797m of this title.

§ 154. National Mediation Board

First. Board of Mediation abolished; National Mediation Board established; composition; term of office; qualifications; salaries; removal

The Board of Mediation is abolished, effective thirty days from June 21, 1934, and the members, secretary, officers, assistants, employees, and agents thereof, in office upon June 21, 1934, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this chapter had not been passed. There is established, as an independent agency in the executive branch of the Government, a board to be known as the "National Mediation Board", to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. Each member of the Mediation Board in office on January 1, 1965, shall be deemed to have been appointed for a term of office which shall expire on July 1 of the year his term would have otherwise expired. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive necessary traveling and subsistence expenses, or per

them allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this chapter. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board. Upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.

All cases referred to the Board of Mediation and unsettled on June 21, 1934, shall be handled to conclusion by the Mediation Board.

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for, no other cause.

Second. Chairman; principal office; delegation of powers; oaths; seal; report

The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

Third. Appointment of experts and other employees; salaries of employees; expenditures

The Mediation Board may (1) subject to the provisions of the civil service laws, appoint such experts and assistants to act in a confidential capacity and such other officers and employees as are essential to the

effective transaction of the work of the Board; (2) in accordance with chapter 51 and subchapter III of chapter 53 of title 5, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 153 of this title, and boards of arbitration, in accordance with the provisions of this section and sections 153 and 157 of this title, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers there for approved by the chairman.

Fourth. Delegation of powers and duties

The Mediation Board is authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this chapter or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, [and] such individual member of the Board or employee designated shall have power and authority to

act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Fifth. Transfer of officers and employees of Board of Mediation; transfer of appropriation

All officers and employees of the Board of Mediation (except the members thereof, whose offices are abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures.

(May 20, 1926, ch. 347, §4, 44 Stat. 579; June 21, 1934, ch. 691, §4, 48 Stat. 1193; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972; Aug. 31, 1964, Pub. L. 88-542, 78 Stat. 748.)

REFERENCES IN TEXT

The civil service laws, referred to in par. Third, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

CODIFICATION

In par. First, provisions that prescribed the basic compensation of members of the Board were omitted to conform to the provisions of the Executive Schedule. See sections 5314 and 5315 of Title 5, Government Organization and Employees.

In par. Third, "subject to the provisions of the civil service laws, appoint such experts and assistants to act in a confidential capacity and such other officers and employees" substituted for "appoint such experts and assistants to act in a confidential capacity and, subject to the provisions of the civil-service laws, such other officers and employees". All such appointments are now subject to the civil service laws unless specifically excepted by such laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

In par. Third, "chapter 51 and subchapter III of chapter 53 of title 5" substituted for "the Classification Act of 1949, as amended" on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1964-Par. First. Pub. L. 88-542 inserted sentences providing that each member of the Board in office on Jan. 1, 1965, shall be deemed to have been appointed for a term of office which shall expire on July 1 of the year his term would have otherwise expired, and that upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified, and struck out provisions which related to terms of office of members first appointed.
1949-Par. First. Act Oct. 15, 1949, increased basic rate f compensation for members of the board to $15,000 per year.
Par. Third. Act Oct. 28, 1949, substituted "Classification Act of 194911 for "Classification Act of 1923". 1934-Act June 21, 1934, amended section generally.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 157 of this title §

155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration.

Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of

an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the lst day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the

Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

(May 20, 1926, ch. 347, §5, 44 Stat. 580; June 21, 1934, ch. 691, §5, 48 Stat. 1195; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107.)

CODIFICATION

As originally enacted, par. Third (b) contained a reference to the "circuit court of appeals". Act June 25, 1948, as amended by act May 24, 1949 substituted "court of appeals" for "circuit court of appeals".

AMENDMENTS

1934-Act June 21, 1934, amended generally par. First and par. Second, (e) and (f).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 156, 157, 183 of this title.

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

(May 20, 1926, ch. 347, §6, 44 Stat. 582; June 21, 1934, ch. 691, § 6, 48 Stat. 1197.)

AMENDMENTS

1934-Act Ju[illegible] 1934, inserted "in agreements" after "intended change" in text, struck out provision formerly contained in text concerning changes requested by more than one class, and substituted "Mediation Board" for "Board of Mediation" wherever appearing-

WAGE AND SALARY ADJUSTMENTS

Ex. Ord. No. 9299, eff. Feb. 4, 1943, 8 F.R. 1669, provided procedure with respect to wage and salary adjustments for employees subject to this chapter.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 152, 157, 726, 741, 797g, 1346 of this title; title 11 section 1167.

§ 157. Arbitration

First. Submission of controversy to arbitration

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151156 of this title such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Second. Manner of selecting board of arbitration

Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall

fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. Board of arbitration; organization; compensation; procedure

(a) Notice of selection or failure to select arbitrators

When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, how*ever, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition

to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators

No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Compensation and expenses

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its

award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board 0 be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under subtitle IV of title 49.

(g) Compensation of assistants to board of arbitration; expenses; quarters

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; fees

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters Submitted to its arbitration, and may for that purpose request the clerk of the district court of the

United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas. , Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

(May 20, 1926, ch. 347, §7, 44 Stat. 582; June 21, 1934, ch. 691, §7, 48 Stat. 1197; Oct. 15, 1970, Pub. L. 91-452, title II, §238, 84 Stat. 930.)

CODIFICATION

In par. Third (f), "subtitle IV of title 49" substituted for "the Interstate Commerce Act, as amended [49 U.S.C. 1 et seq.]" on authority of Pub. L. 95-473, §3(b), Oct. 17, 1978, 92 Stat. 1466, the first section of which enacted subtitle IV of Title 49, Transportation.

AMENDMENTS

1970-Par. Third, (h). Pub. L. 91-452 struck out provisions authorizing board to invoke aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to same extent and under same conditions and penalties as provided for in the Interstate Commerce Act.
1934-Act June 21, 1934, substituted "Mediation Board" for "Board of Mediation" wherever appearing.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-452 effective on sixtieth day following Oct. 15,1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as an Effective Date; Savings Provisions

note under section 6001 of Title 18, Crimes and Criminal Procedure.

FEDERAL RULES OF CIVIL PROCEDURE

Subpoena, see rule 45, Title 28, Appendix, Judiciary and Judicial Procedure.

CROSS REFERENCES

Immunity of witnesses, see section 6001 et seq. of Title 18, Crimes and Criminal Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 154, 155, 797g Of this title; title 18 section 6001.

§ 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

The agreement to arbitrate-

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this chapter;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(1) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, delivered to such board of arbitration.

(May 20, 1926, ch. 347, §8, 44 Stat. 584; June 21, 1934, ch. 691, § 7, 48 Stat. 1197; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127,.. Stat. 107.)

CODIFICATION

As originally enacted, par. (d) contained a reference to the "circuit court of appeals". Act June 25, 1948, as amended by act May 24, 1949, substituted "court of appeals" for "circuit court of appeals".

AMENDMENTS

1934-Act June 21, 1934, substituted "Mediation Board" for "Board of Mediation" wherever appearing.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 797g of this title.

§ 159. Award and judgment thereon; effect of chapter on individual employee

First. Filing of award

The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. Conclusiveness of award judgment

An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third Impeachment of award; grounds

Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the

arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. Effect of partial invalidity of award

If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that apart of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. Appeal; record

At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal there from to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. Finality of decision of court of appeals

The determination of said court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. Judgment where petitioner's contentions are sustained

If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Duty of employee to render service without consent; right to quit

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

(May 20, 1926, ch. 347, §9, 44 Stat. 585; June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107.)

CODIFICATION

As originally enacted, pars. Fifth and Sixth contained references to the "circuit court of appeals". Act June 25, 1948, as amended by act May 24, 1949, substituted "court of appeals" for "circuit court of appeals".

FEDERAL RULES OF CIVIL PROCEDURE

Application of rules, see rule 81, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 159a. Special procedure for commuter service

(a) **Applicability of provisions**

Except as provided in section 590(h) of this title, the provisions of this section shall apply to any dispute subject to this chapter between a publicly funded and publicly operated carrier providing rail commuter service (including the Amtrak Commuter Services Corporation) and its employees.

(b) Request for establishment of emergency board

If a dispute between the parties described in subsection (a) of this section is not adjusted under the foregoing provisions of this chapter and the President does not, under section 160 of this title, create an emergency board to investigate and report on such dispute, then any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish such an emergency board.

(c) Establishment of emergency board

(1) Upon the request of a party or a Governor under subsection (b) of this section, the President shall create an emergency board to investigate and report on the dispute in accordance with section 160 of this title. For purposes of this subsection, the period during which no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose shall be 120 days from the day of the creation of such emergency board.

(2) If the President, in his discretion, creates a board to investigate and report on a dispute between the parties described in subsection (a) of this section, the provisions of this section shall apply to the same extent as if such board had been created pursuant to paragraph (1) of this subsection.

(d) Public hearing by National Mediation Board upon failure of emergency board to effectuate settlement of dispute

Within 60 days after the creation of an emergency board under this section, if there has been no settlement between the parties, the National Mediation Board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony setting forth the reasons it has not accepted the recommendations of the emergency board for settlement of the dispute.

(e) Establishment of second emergency board

If no settlement in the dispute is reached at the end of the 120-day period beginning on the date of the creation of the emergency board, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish another emergency board, in which case the President shall establish such emergency board.

(f) Submission of final offers to second emergency board by parties

Within 30 days after creation of a board under subsection (e) of this section, the parties to the dispute shall submit to the board final offers for settlement of the dispute.

(g) Report of second emergency board

Within 30 days after the submission of final offers under subsection (f) of this section, the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.

(h) Maintenance of status quo during dispute period

From the time a request to establish a board is made under subsection (e) of this section until 60 days after such board makes its report under subsection (g) of this section, no change, except by agreement, shall be

made by the parties in the conditions out of which the dispute arose.

(i) Work stoppages by employees subsequent to carrier offer selected; eligibility of employees for benefits

If the emergency board selects the final offer submitted by the carrier and, after the expiration of the 60-day period described in subsection (h) of this section, the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act [45 U.S.C. 351 et seq.].

(i) **Work stoppages by employees subsequent to employees offer selected; eligibility of employer for benefits**

If the emergency board selects the final offer submitted by the employees and, after the expiration of the 60-day period described in subsection (h) of this section, the carrier refuses to accept the final offer submitted by the employees and the employees of such carrier engage in any work stoppage arising out of the dispute, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.

(May 20, 1926, ch. 347, § 9A, as added Aug. 13, 1981, Pub. L. 97-35, title XI, § 1157, 95 Stat. 681.)

REFERENCES IN TEXT

The Railroad Unemployment Insurance Act, referred to in subsec. (i), is act June 25, 1938, ch. 680, 52 Stat. 1094, as amended, which is classified principally to chapter 11 (§351 et seq.) of this title. For complete classification of this Act to the Code, see section 367 of this title and Tables.

EFFECTIVE DATE

Section effective Aug. 13, 1981, see section 1169 of Pub. L. 97-35, set out as a note under section 1101 of this title.

§ 160. Emergency board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers there for approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the

parties to the controversy in the conditions out of which the dispute arose.

(May 20, 1926, ch. 347, §10, 44 Stat. 586; June 21, 1934, ch. 691, § 7, 48 Stat. 1197.)

AMENDMENTS

1934-Act June 21, 1934, substituted" Mediation Board" for "Board of Mediation" wherever appearing.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 155.

BANKRUPTCY CODE

Sec. 365. - Executory contracts and unexpired leases

(a)
Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, or any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to -

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance -

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will ot disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if -

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts

assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

(d)

(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.

(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate -

(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to -

(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and

(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.

(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal

or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.

(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)

(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on -

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if -

(A)

(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts

assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)

(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if -

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease -

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title -

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title -

(i) immediately before the date of such conversion, if such contract or lease

was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)

(1)

(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and -

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such

rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)

(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and -

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)

(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession -

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)

(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect -

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement

supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for -

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract -

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive -

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall

(A) to the extent provided in such contract or any agreement supplementary to such contract

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual

property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency

BANKRUPTCY CODE

Sec. 1113. - Rejection of collective bargaining agreements

(a)

The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)

(1)

Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall -

(A)

make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the

employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B)

provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2)

During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c)

The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that -

(1)

the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2)

the authorized representative of the employees has refused to accept such proposal without good cause; and

(3)

the balance of the equities clearly favors rejection of such agreement.

(d)

(1)

Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2)

The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3)

The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e)

If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f)

No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Before the
Eastern Air Lines Pilots System Board of Adjustment

EASTERN AIR LINES, INC.	)
- and -	)
THE AIR LINE PILOTS ASSOCIATION	)
	)
L. D. Schulte Grievance	)
	)
ALPA Case No. 1-86	)
	)

The L. D. Schulte grievance was heard on April 19-21, May 11-12, June 14, and November 15-16, 1988 at Miami, Florida, by the 5-member Pilots System Board of Adjustment composed of Company Members Noel R. Honohan and William R. Tegtman, Association Members J. P. Distel and George T. Jehn (Larry C. Wells sat with the Board in the place of George T. Jehn as Association Member for the June 14 and November 15-16 sessions), and Neutral Referee Frank Elkouri.

Appearing for the Company were David P. Callett, Mark J. Schwartz, and Martin A. Soll, and appearing for the Association was James L. Linsey (Russel Hollander participated in the Association's brief; William A. Roberts appeared for the Association at the November 15 session, and with James L. Linsey at the November 16 session).

Briefs were mailed by both Parties on January 20, 1989 (the Association mailed a corrected brief on January 24).

The Board met at Miami, Florida, on February 7, 1989, for discussion of the case in executive session. It was then understood that the Referee would prepare a proposed decision, and that the Board Members would have two weeks (from the date of the letter transmitting that proposed decision) in which to request another executive session.

The Neutral Referee mailed copies of the proposed decision to the Board Members on March 4, 1989. United States Bankruptcy Court jurisdiction over Eastern Air Lines ensued on March 9, 1989, and on September 11, 1989, that Court authorized the System Board to issue its decision in the present case. No additional executive session was thereafter desired by either Party.

OPINION BY NEUTRAL REFEREE

A handwritten document hastily drafted by the Company as its bargain

ing Proposal No. 7 and signed just a few hours later by the Company and ALPA as their agreement under date of February 23, 1986, has been held by the U.S. Court of Appeals, Eleventh Circuit, to constitute in fact a binding collective agreement between Eastern and ALPA in behalf of Eastern's pilots. That document, which hereafter in this Opinion is often referred to as "the February 23 Agreement," contains the language or provision which is now before the Board for interpretation or construction in the present case. In addition to holding the February 23, 1986, document to constitute a binding collective agreement between the Parties, the Court of Appeals held also that the Eastern Air Lines Pilots System Board of Adjustment "will be charged with determining the contours of" certain disputed provisions contained in the February 23 Agreement (grievances had been filed on the disputed provisions).[1] In the present case one of those disputed provisions is before the Board for final resolution.

In addition to other facts which will be noted in the course of the present Opinion, some of the pertinent facts as found and collated by the Court of Appeals in its decision may be noted now. The Court of Appeals explained that:[2]

Eastern and its unions together faced a serious dilemma in the early weeks of 1986. Eastern's above-industry labor costs contributed substantially to its deteriorating financial condition, and the airline realized that if it could not reduce those costs by securing wage concessions from ALPA, the machinists' union, and the flight attendants' union, it would be compelled to opt either for bankruptcy or loss of its independence. Neither alternative appealed to Eastern or to its pilots, who were then engaged in rocky negotiations with the carrier over a new collective-bargaining agreement. While an agreement with ALPA alone would not prevent a sale or bankruptcy, the lack of a contract would probably cause one or the other, and would leave the pilots unprotected after such an event occurred. Reaching some sort of agreement was thus of critical importance to both parties.

Collective-bargaining negotiations between Eastern and ALPA, under the eye of the National Mediation Board (NMB), began in December of 1985. In

1. Eastern Air Lines v. Air Line Pilots Association, 130 LRRM 2284, 2291 (CA 11, 1988).
2. Id. at 2285-2286.

late January 1986, after an impasse, the NMB declared a mandatory thirty-day "cooling off" period under the Railway Labor Act (RLA), after which both the pilots and the carrier could engage in "self-help." Self-help for the pilots entails striking the airline; the airline avails itself of self-help by unilaterally implementing the terms of its final offer. The cooling-off period was to end on February 26.

Intense negotiation continued during the cooling-off period. In the final days of the period. Eastern was approached by a potential suitor, the Texas Air Corporation. Eastern seriously considered accepting Texas Air's offer if it could not resuscitate itself by slashing its labor costs. The offer was due to expire at midnight on February 23, 1986, yet by the 23rd, Eastern and ALPA had not been able to agree to a new contract.

Compounding the external pressure to reach an agreement imposed by the potential of a sale or bankruptcy, the pilots voted on February 21 to strike the airline at the end of the cooling-off period. On February 23, then, the negotiating parties began to work feverishly in the face of the looming deadline, while Texas Air apparently agreed to extend its offer for a few more hours. Wide areas of disagreement still separated the parties.

Sometime in the evening of February 23, ALPA requested Eastern's final offer, and to the ALPA team Eastern offered "EAL No. 7." A handwritten four-page document peppered with "buzzwords" and loose phrases. The terms of EAL No. 7 summarized concepts that the negotiating parties had been discussing over the course of the talks. After some inconclusive haggling. ALPA negotiators submitted the document to the Eastern Air Lines Master Executive Committee (the "MEC"), ALPA's local governing body, without recommending that the draft be ratified. The MEC questioned its negotiators about various provisions of the document and the negotiators, aware that they did not completely understand EAL No. 7, were not able to answer every question posed them. The MEC initially rejected EAL No. 7. Then, in the early hours of February 24, informed that it would have to ratify the document or steer Eastern toward bankruptcy or

toward a sale, the MEC ratified. Following the ratification, Eastern tendered EAL No. 7 for the signature of the relevant ALPA officials, who then signed the document. Eastern tendered EAL No. 7 for the signature of the relevant ALPA officials, who then signed the document. Eastern's officials has already signed EAL No. 7. Eastern's Vice President then substituted the word "AGREEMENT" for "PROPOSAL" as the title of the document. On February 25, Eastern and ALPA executed a signature page in blank.

Despite the apparent success in reaching an agreement with ALPA, Eastern was unable to reach an agreement with its machinists' union. Eastern was therefore sold to Texas Air on February 24.

* * *

From the end of February, the parties attempted to flesh out the terse phrases contained in EAL No. 7. As early as February 25, if not sooner, the parties realized that certain important terms were unclear. While they never were able to agree on precise definitions for six key terms' other parts of the agreement were not in dispute.

* * *

One of the "key terms" which the Court states the Parties "never were able to agree on precise definitions for," is the February 23 Agreement term which is before the Board in the present case. As quoted by the Court from the handwritten February 23 Agreement, this term states: "2. LPP's & Takeover Similar to TWA—need to work out between EAL/ALPA legal counsel".[3] The Court of Appeals specifically indicated that the just-quoted provisions is an "unclear" term of the February 23 Agreement.[4] The Board now must determine what, under

[3] Id. at 2286, fn 1.

[4] Id. at 2286. Subsequently the Court again acknowledged "the lack of clarity in" the term. Id. at 2290.

the evidence of record in this case, is the most reasonable construction to be given to this unclear contractual reference to LPP's. At least it is now in order for the Board to make that determination unless the board finds merit either (1) in the Company's contention that the present grievance "is not ripe for decision," or (2) in the Company's contention that the "grievance is untimely."[5]

Actually, six basic questions or contentions are treated

and answered below in this Opinion (but they are not necessarily considered in any particular order). They concern:

1) The Company's contention that the grievance "is not ripe for decision."
2) The Company's contention that the "grievance is untimely."
3) The Company's basic position that the February 23, 1986, Agreement between the Parties provides LPP protection for pilots only as specified in Sections 3 and 13 of the Allegheny-Mohawk LPP's, and that even those Sections "would become effective only if Eastern merged its pilot seniority list with pilot seniority list of another carrier."
4) ALPA's basic position that the reference to LPP's in the February 23 Agreement incorporates the full package of Allegheny-Mohawk LPP's.
5) ALPA's position in the alternative that if the claim to the full package of Allegheny-Mohawk LPP's is rejected, then the Eastern pilots are entitled to "all of the protections of the TWA LPP's."
6) The question of what is the most reasonable construction of the reference to LPP's in the February 23 Agreement if the contentions of ALPA and the Company concerning that reference are all rejected.

Regarding the Company contention that the grievance "is not ripe for decision," the Company urges that a ruling on the merits of the grievance would constitute an advisory opinion or declaratory judgment. The Company explains:[6]

> "Assuming arguendo that ALPA is correct and that the parties agreed to Allegheny-Mohawk LPPs', there is, nevertheless, no dispute for this Board to decide. Allegheny-Mohawk LPP's provide protections and compensation for employees affected by the merger of two airlines. Thus, unless Eastern has merged with another carrier, the issue presented by ALPA's grievance is

not

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5. Co. Brief, pp. 39-40
6. Ibid, footnote and citation omitted. Also see Co. Brief, p.4.

> ripe for decision. As the Chairman observed, it is not within the Board's jurisdiction to determine [in the present case] whether there has been a merger between Eastern and another airline. Accepting this, and the fact that Eastern has not announced a merger with another airline and that no administrative or judicial body has concluded that such a merger has taken place, no employee can argue that he has been affected by a merger. Therefore, the controversy before the Board is not ripe."

Even though the question whether there actually has been any merger is not before the Board in the present case, the Board's ruling on the merits in the case will not constitute merely an advisory opinion or declaratory judgment. An important issue is properly before the Board and is ripe for decision on the merits. That issue concerns the scope of LPP protection to which the pilots are entitled as a matter of contractual right and the concomitant scope of Company LPP obligation under the February 23 Agreement.

The grievance in the present case is dated August 6, 1986, and contains the following statement as to what is alleged:[7]

> "[T]he undersigned hereby files this MEC grievance based on the Company's disclosure that it will refuse to recognize 'standard' Labor Protective Provisions (Allegheny-Mohawk) as provided in the current EAL/ALPA Agreement dated February 23, 1986."

The Company's belief that the grievance is not ripe for

decision by the Board possibly has resulted in part at least from the Company's unduly narrow view regarding what the grievance statement inherently seeks. In this connection, one of the Company's contentions in this case is that "The scope of ALPA's grievance is limited and ALPA should not be permitted to expand the scope of its grievance."[8] The Company urges that, if the Board does rule on the merits, "The Board should limit its ruling to the question which ALPA's grievance raises: whether, in the February 23, 1986 Agreement, the parties agreed to Allegheny-Mohawk LPP's."[9] Although the grievance statement does call, of

7. Joint Ex. #1, Submission Ex. #1.
8. Company Brief, p. 37.
9. Id. at 39.

course, for an affirmative or negative answer to the question whether the Parties agreed to the Allegheny-Mohawk LPP's, the grievance statement inherently seeks more than that.[10] The fact that the grievance statement does inherently seek more is relevant not only to the Company's contention that ALPA has attempted to expand the scope of its grievance, but is relevant also to the contention that the grievance is not ripe for decision.

In substance and import, if not in literal words, the grievance asserts: (1) the right of pilots to know the general scope of LPP protection they have as a matter of contractual right under the February 23 Agreement; (2) the right of pilots to insist that the Company likewise be cognizant of that general scope of LPP protection and the concomitant Company LPP obligation, so the Company may be prepared to fulfill the obligation as it may become due consequent to future developments; and (3) the right of pilots to insist that the Company not deny the existence of pilot LPP protection of the general scope that actually exists under the February 23 Agreement.

One of the very important benefits inherent in some types of rights comes from merely knowing, without more, that the rights are there. Few understanding persons would deny that an exceedingly important benefit which comes from having life insurance, for example, is the assurance and peace of mind that comes merely from knowing that it is there. LPP's could be considered, in a sense, to be a type of life or casualty insurance. But in any event, LPP's are definitely insurance of some type. The pilots are entitled to know whether they have contractual LPP's; and if they do have LPP's, the pilots are entitled

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10. Even if the grievance statement did only seek a ruling on the question whether the Parties, in the February 23 Agreement, agreed to the Allegheny-Mohawk LPP's, the case arguably would still be ripe for decision. This is so because knowing whether they have a contractual right to the full package of Allegheny-Mohawk LPP's is of such obvious and great importance to the pilots that it would be unreasonable to deny them the answer until a merger has occurred or allegedly occurred.

to know what contractual provisions will apply to control the scope of that protection. Moreover, the pilots are entitled, as a matter of right, to insist that the Company also know these things to enable it to evaluate its contractual LPP obligation. This is essential for the sound managerial planning and decisions critical to the fulfillment of pilot LPP protection.

Thus, the present grievance must be considered ripe for decision. Or at least this is so unless any decision concerning the general scope of LPP's under the February 23 Agreement would be too speculative at this time. It would not be too speculative. Information for resolving the grievance is as much available and as adequate now as it would be later. A ruling on the merits will be no more speculative now than it would be later. The contention that the grievance "is not ripe for decision" is rejected. And as now will be explained, the contention that the "grievance is

untimely," is also rejected.

Much of what has been said above concerning the "not ripe for decision" contention, is relevant also to the contention that the "grievance is untimely." That is, the right of pilots to know the general scope of their contractual LPP protection, and their right to insist that the Company likewise know, and their right to insist that the Company not deny the existence or general scope of the contractual LPP protection, are all continuing rights: each and every day that these rights are denied to the pilots by the Company, their right to protest by grievance arises anew.[11]

But even apart from the fact that the grievance by nature involves a continuing violation, another consideration in rejecting the contention that the grievance is untimely, is the fact that discussions on LPP's were ongoing

11. ALPA, too, believes the case involves a continuing violation, but ALPA states a different rationale for the belief. ALA Brief, pp. 19-21. Since the rationale stated hereinabove shows that a continuing violation is involved, the rationale stated in ALPA's Brief is not evaluated here.

between the Parties through the spring and much of the summer of 1986. In the latter regard ALPA states:[12]

> "ALPA first learned that Eastern had foreclosed any possibility of providing Allegheny-Mohawk LP's on July 10, 1986, when Eastern amended its complaint [in its court action] to assert that no valid collective bargaining agreement between ALPA and Eastern existed. Prior to that time ALPA and Eastern had been discussing ways to resolve their differing interpretations of the contractual language including, but not limited to, LPP's. These discussions occurred on an ongoing basis from February up to and including July. It was not until July 10, 1986 when Eastern asserted

> that no valid collective bargaining agreement existed that ALPA realized those discussions were futile. ALPA promptly filed the present grievance on August 6, 1986 well within the 45 day time limit prescribed by Section 30 of the ALPA-Eastern Collective Bargaining Agreement.
>
> "In similar circumstances, arbitrators have found that the time limit to file a grievance does not begin to run until informal attempts to resolve the dispute break down. [ALPA's footnote here states, with support by a Transcript citation, that "This is entirely consistent with the parties practices at Eastern."] These decisions reason that so long as there may be a chance to resolve the dispute short of the formal arbitration process, informal discussions should be encouraged."[12]

Both in its Brief in the present case and in its position in the court action, the Company itself has affirmed that there were ongoing discussions between the Parties on LPP's and other key issues at least until August 1986.[13]

The Company denies that the ongoing discussions had the effect of toll-

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12. ALPA Brief, pp. 17-18, Transcript citations omitted.

13. Company Brief, p. 43, referring to "the discussions held by the parties from March through July 1986"; Eastern Air Lines v. Air Line Pilots Association, 130 LRRM 2284, 2286 (CA 11, 1988), where the Court stated: "In August, ALPA attempted to invoke adjustment-board procedures to resolve three more disputes under EAL No. 7, concerning the 'labor protective' term, medical and dental benefits, and 'pseudo' contributions to the pilots' retirement plan. In September, Eastern again amended its complaint, and alleged that

> Contrary to the assertions of [ALPA], no agreement presently exists between ALPA and Eastern with respect to any of the matters referred to above. On the contrary, these and other matters have been the subject of ongoing, but to date unsuccessful collective bargaining negotiations * * *." (emphasis added)

ing the running of contractual time limits. The Company declares that "at no point in these discussions was there an agreement to extend the 45-day time limits and Eastern never gave any indication that it would change its position on LPP's."[14]. But neither did the Company give any indication that it would not change its position on LPP's; until the Company renounced the Agreement to the court, it had never given clear notice that the ongoing discussions and the possibility of settlement of the LPP issue was ended. Although the waiver of contractual time limits should not be lightly implied, a specific and express understanding by the Parties is not the only possible basis for tolling their running (unless the contract expressly provides otherwise). As stated hereinabove, another consideration in rejecting the contention that the present grievance is untimely, is that there were ongoing discussions between the Parties on LPP's.

Turning now to the merits of the grievance, the Board must determine what, under the evidence of record in this case, is the most reasonable construction to be given to the reference to LPP's in the February 23 Agreement. As we have noted, that reference is contained in the following portion of the Agreement: "2. LPP's & Takeover Similar to TWA—need to work out between EAL/ALPA legal counsel".

The following statement by the Company indicates the basic position it has taken as to the meaning or significance of the reference to LPP's in the February 23 Agreement:[15]

> "The contested language 'LLP's & Takeover Similar To TWA' is clear and unambiguous. The language is susceptible to only one interpretation – Eastern proposed and ALPA agreed to TWA LPP's (Section 3 and 13 of the Allegheny-Mohawks LPP's), <u>which would become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier.</u>"

14. Company Brief, p. 43.
15. Co. Brief, p. 2, emphasis added. Co. Brief, p. 16, again asserts the limitation that pilot seniority rights would be protected by Sections 3 and 13 only "in the event there were a merger of" seniority lists.

Another statement by the Company reflects its understanding regarding ALPA's position in the case:[16]

> "The disputed language 'LLP's & Takeover Similar to TWA' is clear and unambiguous. Interestingly, both Eastern and ALPA agree on this. Yet the parties believe that the disputed language has a different meaning. ALPA reads the language as if there is a period after the acronym 'LPP's' and the phrase 'Similar to TWA' modifies only the word 'Takeover' and not the acronym 'LPP's. ALPA contends that the acronym 'LPP's' standing alone can only refer to Allegheny-Mohawk LPP's."

That ALPA in fact does read the disputed language as if there is a period after the term "LPP's," making it much more certain that the term does stand alone, seems implicit in ALPA's own statement of its basic position, which is "that the pilots bargained for and received standard, i.e. Allegheny-Mohawk, LPP's."[17]

It is not necessary for the Board to decide in the present case whether the term or acronym "LPP's" should be treated as standing alone, or whether it should be treated as being modified by the words "Similar to TWA." This is so because its meaning would be uncertain in either event. Whether the term is viewed as standing alone, or as being modified, either way the Board still would be forced to reply upon bargaining history and/or other extrinsic evidence in order to determine what is the general scope of LPP protection to which the pilots are entitled as a matter of contractual right under the reference to LPP's in the February 23 Agreement. Standing alone, the term "LPP's" is too general to be clear and certain – while the Allegheny-

Mohawk LPP's promulgated by the Civil Aeronautics Board initially may have been the only known type of LPP's, other varieties subsequently did come into use. And if the term "LPP's" were viewed as being modified by the words "Similar to TWA" in the February 23 Agreement, the general scope of LPP protection under that Agreement still would be uncertain – to be "similar to" is not the same as being "iden-

16. Co. Brief, pp. 14-15, footnote omitted.

17. ALPA Brief, p. 1. In claiming "standard" or "Allegheny-Mohawk LPP's," ALPA means the full package of Allegheny-Mohawk LPP's.

tical with." But even if "similar to" were considered to be the same as "identical with," that might not provide any easy or automatic answer. It might be difficult to apply for Eastern pilots LPP's identical with all of the LPP's to which TWA pilots are entitled under the January 3, 1986, letter of understanding between ALPA, Trans World Airlines, and Carl C. Icahn and his affiliates (the letter of understanding is referred to elsewhere in this Opinion as the "TWA Agreement").[18] In the latter regard, the TWA LPP's do not appear to be as readily adaptable as the Allegheny-Mohawk LPP's for use in mergers between other carriers.[19]

Notwithstanding any difficulty that may be involved in an attempt to use the TWA LPP's in toto for Eastern's pilots, ALPA does request in its Brief (p. 36) that the Board "order Eastern to recognize and abide by standard LPP's

18. The letter of understanding was introduced into evidence in the present case as ALPA Exhibit #4.

19. Unlike the package of LPP's contained in the TWA Agreement, the Allegheny-Mohawk LPP's are stated in such terms as to be usable with little or no modiviation for other airline mergers. The Allegheny-Mohawk LPP's in fact were imposed by the Civil Aeronautics Board for other airline mergers, with the result that they

sometimes are referred to as "standard" LPP's. In the latter regard, the U.S. Department of Transportation, in a case related to the present case, explained on January 9, 1989, that:

> "The standard LPP's sought by the labor parties are those drafted by the Civil Aeronautics Board * * * in Allegheny-Mohawk Merger, 59 CAB 22, 45-49 (1972), and applies by the Board in later cases with virtually no changes. The standard LPP's would provide financial benefits for employees whose jobs were lost, displaced, or moved as a result of the transaction and would require a fair integration of the carriers' seniority lists." Remanded Texas Air-Eastern Acquisition Case, Docket 44346, Final Order 89-1-11, p. 2 fn. 1 (DOT, 1989).

In the latter Order (at 15-16) the DOT denied "the requests that standard labor protective provisions be imposed"; instead, the DOT "as a condition upon the approval * * * of Texas Air Corporation's acquisition of Eastern Air Lines," imposed a stipulation by Texas Air Corporation and Eastern Air Lines that certain possible future events would not extinguish "the Labor Protective Provisions which may be contained in any Eastern Air Lines collective bargaining agreement." For more on this, see ALPA Brief, pp. 3-4, where ALPA also explains, to this Board, that: "ALPA's simultaneous pursuit of Government-ordered LPP's is not inconsistent with its position that standard LPP's are included in the February Agreement. Indeed, ALPA may feel much more secure cloaked with a Government order policed by the United States than with provisions of a collective bargaining agreement which was challenged in lengthy litigation by Eastern."

in the February Agreement. In the alternative, this System Board should order Eastern to recognize and abide by all of the protections of the TWA LPP's in its February Agreement." In this regard, ALPA in its Brief (p. 35) expresses its belief that:

> "The TWA Agreement, while somewhat different from standard Allegheny-Mohawk LPP's, provides genuine protections through the preservation of assets and by other controls. * * * Paragraph 10 of the TWA Agreement specifically provides for the preservation of TWA's aircraft fleet and level of operations, prohibits the full or

> partial merger of the airline without the consent of ALPA, and attaches as Appendix B there to Sections 1, 2, 3 and 13 of Allegheny-Mohawk LPP's. ***
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> "In the negotiations leading to the February Agreement, Eastern made no reference at all to any LLP provisions in the TWA Agreement * * * much less initiated any discussion to delete or modify those provisions. Therefore, if Eastern persists in its argument that it agreed to LPP's similar to TWA, this Board should closely examine paragraph 10 and related provisions of the TWA Agreement and treat Eastern to what it requests and so richly deserves: labor protective provisions, including fleet asset and operational level guarantees and merger restrictions, which approximate those contained in paragraph 10 and related provisions of the TWA Agreement."

However, even apart from any other consideration standing against acceptance of ALPA's request in the alternative for "all of the protections of the TWA LPP's," a sufficient reason for rejecting such a request is that the record in the present case offers virtually no indication, if any at all, that either Eastern or ALPA actually had even the slightest thought of incorporating all of the TWA Agreement LPP's into the February 23 Agreement. An order by this Board for such a result would in no sense be the most reasonable construction which could be given to the reference to LPP's in that Agreement – any such order would deviate much too far from the intent or expectation of either Party when the February 23 Agreement was adopted.

But neither does the record in this case justify any conclusion that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's.

Space will not be devoted in the present Opinion to a detailed discussion

of the evidence that has been submitted by the Company to show that the pilots knew or should be charged with notice that the Company in entering into the February 23 Agreement believed and expected that something considerably less than the full package of Allegheny-Mohawk LPP's was being contracted for. Rather, it suffices to state here that the Company in its Brief, with ample citation of evidence contained in the Transcript and Exhibits, has discussed that evidence and has indeed shown that the pilots knew or should be charged with notice that the Company intended and believed that something considerably less than full Allegheny-Mohawk LPP's was being contracted for.[20]

Two factors that the Company places special reliance upon in the latter regard, are (1) that "ALPA's President, Henry Duffy, who signed both the TWA [A]greement and the Eastern Agreement, was present when Eastern's LPP proposal was made and at the MEC meeting which approved the proposal," and (2) that "Seth Rosen, ALPA's Director of Representation, brought the TWA LPP's to the attention of Alan Gibson, the Chairman of Eastern's Negotiating Committee."[21] Concerning the latter factor, the Company states that:[22]

> "After presenting copies of Eastern's Proposal No. 7 to ALPA's negotiators, Mr. Gibson read the language of that proposal and asked ALPA's negotiators if they had any questions. Receiving none, he assumed ALPA's negotiators understood Eastern's proposal. Mr. Gibson's assumption was clearly reasonable, because seated

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20. See Co. Brief, pp. 3, 5-10, 12-13, 21, 26. Also see Tr 316-317, 324, 326-327. Moreover, it is difficult to refute the Company's argument that: "Considering Eastern's dire financial condition on February 23, 1986, and the general concessionary nature of the Eastern's contract proposals (including a 20% pay reduction for pilots) it is inconceivable that Eastern would propose, or ALPA believed that Eastern was proposing the high-cost Allegheny-Mohawk LPP's." Id. at 31. This Company argument has at least some merit – it

cannot be totally discounted or rejected by the Board.

21. Co. Brief, p. 3.

22. Co. Brief, pp. 25-26, Transcript citations omitted.

> across the table was Mr. Brandley, who in conjunction with Mr. Rosen had first informed Mr. Gibson about TWA LPP's, suggesting that these limited LPP's could be the basis for an agreement between Eastern and ALPA on LPP's. Mr. Gibson knew that Messrs. Rosen and Bradley had advised him that TWA LPP's, Sections 3 and 13 of Allegheny-Mohawk LPP's, were the heart of the TWA agreement and that proposing these sections might serve to break the dead-lock between the parties on LPP's."

ALPA's Director of Representation, Seth Rosen, testified on cross-examination before the Board (Tr 1023):

> "Q. You did tell him [Gibson], did you not, that Sections 3 and 13 of the Allegheny-Mohawk LPP's was the heart of the LPP's?
>
> "A. When I gave him the copy of the LPP's I told him he should look at 3 and 13 because they cover seniority integration.
>
> "Q. I think you used the words 3 and 13 are the heart?
>
> "A. From my perspective, because they control seniority. From my perspective they are the heart."

In turn, ALPA explains in its Brief (p. 11) that:

> "Mr. Rosen was not authorized by the Negotiating Committee to negotiate for the Eastern pilots but was authorized to go (with John Bradley) see representatives of Eastern * * *. The purpose of that meeting was 'to ascertain exactly what the status of negotiations were, to try to get a picture of where we were. That was basically listening to the Company on their so-called open issues.' Tr. 1006 (Rosen). Precisely what happened at Mr. Ussery's

> office is disputed: Mr. Gibson alleges that Mr. Rosen indicated that while they would like full Allegheny-Mohawk LPP's, ALPA would be willing to settle for TWA LPP's and pointed to only sections 3 and 13 of Allegheny-Mohawk LPP's, Tr. 825, 946-48, 959 (Gibson); Mr. Rosen strenuously denies this and testified that he gave Mr. Gibson the complete Allegheny-Mohawk LPP document at this point, stressed ALPA's interest in triggers, and told him to look at the TWA Agreement (without isolating the LPP's). Tr. 1006-09, 1025 (Rosen)."

Thus, it is undisputed at least that although Rosen was not authorized to negotiate for the Eastern pilots (Gibson has in fact acknowledged that Rosen did not negotiate), Rosen was authorized to talk with Company Officials and he did direct them to the TWA Agreement. Director of Representation Rosen testified that the purpose of this meeting was "to see if there was any way to get the negotiating process started because it * * * had been stymied" (Tr. 1020), and that he "made general reference to the fact [that ALPA] had

reached an agreement at TWA, including a wrap around agreement, with Carl Icahn, and they contained some language that should be looked at" (Tr 999). ALPA has not denied the validity of this testimony. Certainly, by implied ratification, if not otherwise (as by prior express authorization), Rosen was the authorized agent of the Pilot Negotiating Committee.[23]

Even assuming arguendo that the ALPA Negotiating Committee was not fully informed regarding all that had transpired in the discussions between Rosen, Bradley, Gibson, and Ussery, knowledge of the above-noted words and actions of Director of Representation Rosen in those discussions (and also the resultant knowledge that thereafter

the Company in using the acronym LPP's," might be thinking in terms of TWA LPP's, or at least might not be thinking exclusively in terms of Allegheny-Mohawk LPP's), must be imputed to the ALPA Negotiating Committee:

> "It is the general rule, settled by an unbroken current of authority, that notice to, or knowledge of, an agent while acting within the scope of his authority an din reference to a matter over which his authority extends, is notice to, or knowledge of, the principal.'
>
> * * *
>
> "The fact that the knowledge of or notice to the agent was not actually communicated to his employer will not prevent the operation of the general rule that the master-principal is chargeable with such knowledge or notice."[24]

Moreover, another possible basis for charging the pilot representatives with notice that Eastern Proposal No. 7 might not be intended to give the pilots full Allegheny-Mohawk LPP's, would be application of the "constructive notice" concept: "Constructive notice exists when the party, by any circumstance whatever, is put upon inquiry * * *"[25] The Company has pointed to various circumstances calling for inquiry and which likely would have led to inquiry had the pilots' desire to obtain an agreement on February 23, 1986, not been

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23. Also relevant in this regard is the fact that Rosen promptly met with the ALPA Negotiating Committee to brief them as to "generally what we had discussed." Tr 1010.

24. Ferson, Principles of Agency, §100 (1954), quoting Mechem, Agency, 2d ed. §1803.

25. Bouvier's Law Dictionary, 3rd ed. §1803.

so urgent.[26]

As noted above in the quotation from ALPA's Brief, the testimony of Gibson and that of Rosen differs dramatically

as to whether Rosen stated that ALPA would like Allegheny-Mohawk but could live with the TWA LPP's, and stated that the TWA LPP's were Allegheny-Mohawk Sections 3 and 13.[27] Without attempting to reach any conclusion as to which version is accurate, it is clear enough that regardless of what Rosen's words actually were in the course of his discussions with Gibson and Ussery, and regardless of what might have been Rosen's actual intent, the message that Gibson actually received from the discussions was that something less than the full package of Allegheny-Mohawk LPP's would at least be considered by ALPA – and that, in particular, Sections 3 and 13 of the Allegheny-Mohawk LPP's possibly could be the LPP protection to be adopted.

Upon weighing all of the evidence relating to ALPA's claim to full Allegheny-Mohawk LPP's, it cannot reasonably be concluded that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's.

But can the Company's basic position in this case be considered to be the most reasonable construction of the February 23 Agreement's reference to LPP's? As previously noted, the Company's basic position is that the February 23 Agreement's reference to LPP's incorporates "Sections 3 and 13 of the Allegheny-Mohawk LPP's," but "which would become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier."

On the morning of February 23, 1986, the Company's then Chairman of the Board of Directors and CEO, Colonel Frank Borman, requested that he meet alone with the ALPA negotiating Committee. ALPA negotiators have testified literally

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26. Company Brief, pp. 12-13. Also regarding cause for inquiry, see Tr 316-317, 324, 326-327.

27. For some of their conflicting testimony on this see Tr 948, 959 (Gibson); Tr 1009 (Rosen).

or in substance that in that meeting Colonel Borman made a commitment that LPP's were "not a problem" and that the pilots were entitled to them.[28] The Company states in this regard:

> "Colonel Borman met with the pilots to add urgency to the need for an agreement. He did not meet with the pilots to negotiate, and he struck no private deals with the pilots. Although ALPA attempts to make much of their private meeting with Colonel Borman, ALPA's negotiators did not 'use the term Allegheny-Mohawk, [or] Standard LPP's 'at any time during that meeting. Even if this Board is to credit ALPA's witnesses' assertions that Colonel Borman said that LPP's 'were not a problem', that does not establish that Colonel Borman meant Allegheny-Mohawk LPP's. This is particularly true because [ALPA negotiator] Christy advised Colonel Borman that the pilots '...[were] concerned about seniority...'"[29]

ALPA's evidence in this case is not sufficient to establish that Colonel Borman made a commitment to the pilots to grant the full package of Allegheny-Mohawk LPP's; and this is particularly so in view of the fact that neither the term "Allegheny-Mohawk" nor even the word "standard" was contained in any of ALPA's written proposals from the commencement of negotiations in early December 1985 until negotiations culminated with the signing of the February 23 Agreement.[30] Also, as far as notice to Borman from ALPA other-

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28. ALPA Brief, pp. 13-14; Tr 76, 247, 332-333 (Tully testimony); Tr 657, 660-661 (Loomos testimony).

29. Company Brief, p. 22 citations of Transcript and Exhibits omitted. It may be noted that ALPA Negotiating Committee Chairman Tully testified as follows on cross-examination (Tr 246-247):

> "Q. If I remember your testimony on direct it was that you said that you wanted LPP's and Colonel Borman said he didn't have a problem with that. Is that a fair characterization of your testimony?

"A. That is correct * * *

"Q. You never said well, we want Allegheny-Mohawk LPP's did you?

"A. We didn't use the term Allegheny-Mohawk, Standard LPP's".

But regarding ALPA Negotiating Committee meetings with Eastern Negotiating Committee (Borman not present), Tully testified that the ALPA Negotiating Committee did speak of "Standard Labor Protective Provisions," and that "perhaps" some ALPA negotiator "may have used Allegheny-Mohawk." Tr 59. But Tully also testified that it "may not have been used." Tr 184.

30. The negotiations which resulted in February 23 Agreement commenced in early December and the Company tendered the first proposal, after

wise is concerned, it appears to be more likely that only the general term "LPP's" was brought to his attention (see Footnote 29, above). And since Gibson and Ussery understandably may have been thinking in terms of LPP's significantly less beneficial to the pilots than the full package of Allegheny-Mohawk LPP's, notice cannot reasonably be imputed to Borman through Gibson and Ussery that the pilots were thinking only in terms of the full package of Allegheny-Mohawk LPP's.[31]

But notwithstanding the foregoing considerations, and notwithstanding Colonel Borman's assertion by deposition that he did not meet with the ALPA

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30. FOOTNOTE CONTINUED

which ALPA made its first proposal. Tr 52 (Tully). "LPP's were first proposed by ALPA's Negotiating Committee on January 17, 1986 with delivery of ALPA Proposal No. 4 * * * [which] concluded as follows: * * * ALPA is proposing that the amended agreement provide for LPP's." ALPA Brief, pp. 8-9. Reference to LPP's in later ALPA proposals similarly used merely the general term "LPP's." In the latter regard, the Company observes that "The October 6, 1985 letter from Mr. Schulte to Colonel Borman demonstrates that ALPA is capable of clearly proposing Allegheny-Mohawk LPP's," Schulte having explained in the letter that "The Labor Protective Provisions that were imposed in the Allegheny-Mohawk merger are the ones that I propose should be used to protect

our pilots * * *." Company Brief, p. 21 fn 15. That letter from Schulte (MEC Chairman and grievant in the present case) is in evidence as ALPA Ex. #6 On the Company's part, the only reference at all to LPP's in any of the Company's written proposals made at any time in the course of the negotiations which commenced in December 1985 and culminated with the signing of the February 23 Agreement, was that contained in Company Proposal No. 7, which is now before the Board for construction. See Tr 87. Even in oral discussions between the Eastern and ALPA Negotiating Committees, while the word "standard" sometimes was used by ALPA, the term "Allegheny-Mohawk" may not have been used at all. See Footnote 29, above; ALPA Brief, p. 6; Company Brief, p. 21.

31. Regarding actual notice to or knowledge by Borman during the negotiations which culminated in the February 23 Agreement, the record in this case does not reveal what might have been his actual understanding or thoughts concerning LPP's. As previously stated, the term "LPP's" standing alone is too general to be clear and certain as to scope. The ALPA Negotiating Committee only asserts its use of that general term when Borman met alone with the Committee. See Footnote 29, above. And on the Company's side, Gibson testified that he did not talk to Borman about LPP's. Tr. 908. Thus, Borman's actual understanding or intent concerning LPP's, whatever it was, should not be a factor in the decision in this case. However, as stated below, an important factor is that one of the messages which the ALPA Negotiating Committee actually received from Borman was that the pilots could expect meaningful contractual protection from LPP's.

Negotiating Committee to negotiate,[32] the strong testimony by ALPA witnesses (who testified in person before the Board and were subjected to cross-examination) sufficiently establishes that regardless of what Borman's words actually were during his February 23, 1986, meeting with the ALPA Negotiating Committee, and regardless of what might have been his actual intent at that time, one of the messages which the Committee actually received from him as Company CEO was that the pilots could expect LPP's which would provide meaningful protection as a matter of contractual right.

Is the Company now acknowledging meaningful protection? Could the pilots reasonably be expected to get any real sense of security or peace of mind from the Company's basic position in this case? Certainly the pilots reasonably could question whether they would have meaningful LPP protection as a matter of contractual right if the Board were to accept the Company's position that although Sections 3 and 13 have been incorporated into the February 23 Agreement, they shall "become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier."

ALPA declares that meaningful LPP protection "becomes illusory" under the Company's construction of the reference to LPP's in the February 23 Agreement,[33] and ALPA explains its view of "meaningful LPP protection:[34]

> "Meaningful protection under standard LPP's was and is of grave concern to the Eastern pilots. In addition to certain pecuniary allowances under standard Allegheny-Mohawk LPP's [a footnote here refers to 'displacement allowances, dismissal allowances, real estate claims, etc.'], genuine job security derives in large part from preserving the separate integrity of assets and operations

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32. Borman's deposition, given in connection with court proceedings, contains no apparent reference to LPP's, but he did deny that he negotiated with the ALPA Negotiating Committee when they met alone. Company Ex. #18, pp. 46, 50-51. The Company states that after the meeting Borman disclaimed also having made any deal with the Committee. Company Brief, pp. 22-23, citing testimony by Gibson. Because Borman did not appear before the Board to give testimony, it was not possible to question him on what he might have said on the subject of LPP's.
33. ALPA Brief, p. 1.
34. ALPA Brief, p. 26.

of the merging carriers until a fair and reasonable

> seniority integration of labor groups is accomplished. Thus, standard LPP's provide triggers for the immediate integration of labor groups once the separate integrity of assets and operations is disturbed. [Here ALPA cites Allegheny-Mohawk Section 2(a) as broadly defining 'merger' to mean joint action by the two carriers whereby they 'unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services', Section 3 as triggering seniority integration immediately insofar as the merger affects seniority rights, and Section 13 as providing for expedited arbitration of seniority integration]. Such Allegheny-Mohawk seniority integration triggers, coupled with liabilities from pecuniary allowances, are the heart of meaningful protection * * *."

As the just-quoted ALPA statement indicates or at least implies, Allegheny-Mohawk Section 3 has its own "trigger." And ALPA also is correct in asserting that meaningful LPP protection "becomes illusory" under the Company's position in the present case. In substance if not in words, the Company position is that:

> The February 23 Agreement does not incorporate the full package of Allegheny-Mohawk LPP's; but it does incorporate Allegheny-Mohawk Sections 3 and 13 except as they are modified by the following facts or alleged facts:
>
> (a) The TWA Agreement substitutes a different "trigger" for Allegheny-Mohawk Section 3;
>
> (b) The "trigger" under the TWA Agreement is that there must have been a decision by management that seniority lists shall be integrated; and
>
> (c) In adopting the February 23 Agreement the Parties adopted the TWA Agreement trigger making a management decision to integrate seniority lists a condition precedent to the applicability of anything contained in

Allegheny-Mohawk Section 3.

It will be recalled that the following statement was made earlier in the is Opinion: "Upon weighing all of the evidence relating to ALPA's claim to full Allegheny-Mohawk LPP's, it cannot reasonably be concluded that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's." Now it must be stated, more specifically, that the evidence in the present case does not sustain ALPA's contention that the pecuniary allowances provided in the Allegheny-Mohawk LPP's may be asserted,

in addition to the protection of Sections 3 and 13, as a matter of contractual right by Eastern's pilots. But even without the pecuniary allowances, as desirable as they may be, the protection of seniority itself by application of Sections 3 and 13 is of such critical importance that this without more does constitute meaningful protection under the February 23 Agreement. The latter belief or conclusion would hold as well even without the support of ALPA Director of Representation Rosen's testimony that Sections 3 and 13 are the heart" of the Allegheny-Mohawk LPP's "because they control seniority." But Rosen's words do state it very well.

Before further comment is made regarding Sections 3 and 13 of the Allegheny-Mohawk LPP's, those important Sections are quoted now in full:

> "Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

"Section 13(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

"(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of

having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties."

Under the Company's position, Sections 3 and 13 would not in reality be the controlling factor as concerns seniority. Rather, Company discretion or freedom of choice would be the controlling factor. In any event, if the Company's position regarding applicability of the TWA

trigger were accepted by the Board in the present case, then as long as any reasonable possibility might continue to exist that the TWA trigger ultimately would be construed to require a management decision to integrate seniority lists as a condition precedent to the protection of Sections 3 and 13, doubt would remain as to whether the pilots would in fact have any meaningful protection.[35]

35. A contention that management would have discretion, under the TWA Agreement, to decide whether or not there will be any integration of seniority lists would in no sense be frivolous. In the latter regard, note that Paragraph 10. of the TWA Agreement provides (ALPA Ex. #4, pp. 7-9) that "if TWA, New TWA or the Icahn Group acquires" control of another airline, then by (b) (iii):

> "Section 3 and Section 13 (as it relates to Section 3 alone and to the extent it may be invoked by the airline or the pilots' collective bargaining representatives alone) of the AAA-MOH LPPs, dealing with integration of seniority lists, shall be provided to the TWA Airline pilots in the event of any full or partial merger of the pilot seniority lists of the TWA Airline and the Acquired Airline."

One entirely rational interpretation of the just-quoted provision would be that only the carrier (or possibly the carrier in conjunction with the pilot bargaining representative but in no case the latter alone) may decide whether under Section 3 there is to be any integration of seniority lists, but if it is decided that seniority lists shall be integrated, then either the carrier or the pilot bargaining representative may require use of arbitration under Section 13 to determine how or by what integration scheme the lists shall actually be combined. Under this interpretation of the TWA Agreement the carrier obviously could prevent integration of seniority lists and accordingly the condition precedent for the application of Sections 3 and 13 would be absent case could indeed make meaningful LPP protection "illusory," as ALPA has stated.

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In light of various considerations discussed hereinabove, the Board should not issue any award in this case which is not definitely intended and calculated to recognize meaningful LPP protection for pilots as a matter of contractual right under the February 23 Agreement. Nor need the Board do so, for Alleghany-Mohawk Section 3 has its own "trigger". That trigger inheres in the Section 3

words "Insofar as the merger affects the seniority rights of the carriers' employees." The meaning of the term "merger" in the just-quoted phrase is specified by the Alleghany-Mohawk Section 2 (a) definition of the term:

> "Section 2 (a). The term 'merger' as used herein means joint action by the two carriers whereby they unify, consolidate, merge or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities."

Significantly, the foregoing Section 2 (a) definition of the term "merger" is expressly made applicable wherever the term is "used herein". It is certain that the just-quoted word "herein" refers to the Civil Aeronautics Board document containing LPP's promulgated by the Board for the Alleghany-Mohawk merger ("and applied by the Board in later cases with virtually no changes" 36). Thus, the Section 2 (a) definition is inherently and necessarily a part of each and every Alleghany-Mohawk provision in which the term "merger" is used, and this of course applies to use of the term "merger" in Section 3. Moreover, being an inherent and necessary part of Alleghany-Mohawk Section 3, the Section 2 (a) definition must be deemed applicable to Section 3 whenever other parties adopt Section 3 for their own use unless they make it abundantly clear that their intent is otherwise. Eastern and ALPA did adopt Alleghany-Mohawk Section 3 for use in the February 23 Agreement. But by no means did Eastern make it abundantly clear, either when Eastern drafted it Proposal No 7 or when

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36. The latter quotation is from the "Remanded Texas Air-Eastern Acquisition Case" decision of the Department of Transportation, as previously quoted hereinabove.

Gibson read the proposal to the ALPA Negotiating Committee, that the term "merger" as used in Section 3 would mean anything different from the meaning given it by

the Civil Aeronautics Board in the Allegheny-Mohawk LPP's. And it is even more certain that the ALPA Negotiating Committee was given no hint, when Eastern Proposal No. 7 was read to them, that it was intended to leave pilot LPP protection up to the future choice and discretion of the Company.[37]

Had the ALPA Negotiating Committee received at least a hint of any such Company intent, the Committee might well have then taken to the MEC a much different position on Eastern Proposal No. 7 than the apparently neutral position which was actually carried to the MEC. There is no thought here of charging the Company with intent to deceive. But it is entirely fitting to point out that if the Company intended by its Proposal No. 7, the highly uncertain protection produced by the Company's present position regarding the triggering of Sections 3 and 13, then the Company was obligated to inform the pilots of that intent. And this is so even though no question was asked about the reference to LPP's when Proposal No. 7 was read to the ALPA Negotiating Committee on February 23, 1986.[38]

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37. See Tr 88-89 where ALPA Negotiating Committee Chairman Tully described the atmosphere prevailing when Eastern Negotiating Committee Chairman Gibson read Eastern Proposal No. 7 to the ALPA Committee, and where Tully also testified as follows: "He [Gibson] gave us the proposal * * *. He ran through it very briefly, and said, I am paraphrasing once again, he said, we have to leave. We have to go now." Apparently Gibson said little if anything about the Company's LPP proposal. See Tr 108-109 (Tully); 855-857, 930 (Gibson). Surely, caveat emptor is not acceptable as the order of the day notwithstanding the fact that pressure on the ALPA Negotiating Committee was coming not only from the Company but also from the pilot group.

38. At various points in the course of reading the proposal to the ALPA Negotiating Committee Gibson offered opportunity for questions, but apparently none was asked. See Tr 266-268 (Tully on cross-examination). But as stated above, an obligation to volunteer information existed as concerns LPP's. On the other hand, the recognition of an obligation to volunteer information does not apply equally to the Company's intent not to provide pecuniary allowances such as those provided by the Alle-

Under all of the evidence of record in this case and in light of all of the considerations discussed above in this Opinion, it is concluded that the most reasonable construction of the reference to LPP's in the February 23 Agreement is that it incorporated into the latter Agreement Section 2 (a), 3 and 13 of the Alleghany-Mohawk LPP's.

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38. Footnote Continued:

gheny-Mohawk LPP's, since no ALPA spokesperson has stressed that type of protection to the Company nearly as emphatically as the Section 3 and Section 13 protection was stressed. And here we should not again of the Company's argument that "Considering Eastern's dire financial condition on February 23, 1986, and the general concessionary nature of Eastern's contract proposals (including a 20% pay reduction for pilots) it is inconceivable that Eastern would proposed, or ALPA believed that Eastern was proposing the high-cost [pecuniary allowances provided by the] Alleghany-Mohawk LPP's. " Company Brief, p. 31. As stated earlier in this Opinion, this company argument has at least some merit – it should not be totally discounted or rejected.

AWARD

The L.D. Schulte grievance (ALPA Case No. 1-86) is hereby resolved as follows: As concerns labor protective provisions, the February 23, 1986, Agreement between ALPA and Eastern Air Lines includes Sections 2(a), 3, and 13 of the Allegheny-Mohawk LPP's. It does not include any other provision which is included in the TWA Agreement; nor does it include any other part of the Allegheny-Mohawk LPP's except that the question whether it includes Allegheny-Mohawk Section 2(d) need not be answered and is not answered in the present case.

By order of the Eastern Air Lines
Pilots System Board of Adjustment
September 22, 1989

S/S: Frank Elkouri
Neutral Referee

S/S: J.P. Distel
Association Member

S/S: George T. Jehn
Association Member

S/S: William R. Tegtman
Company Member

S/S: Noel R. Honohan
Company Member

Dissenting: S/S: William R. Tegtman
S/S: Noel R. Honohan

LABOR PROTECTIVE PROVISIONS ARBITRATION
EASTERN AIR LINES AND AIR LINE PILOTS ASSOCIATION
ARBITRATION FINDINGS AND OPINION
RICHARD R. KASHER, ARBITRATOR
AUGUST 4,1992

In the Matter of an Arbitration Between

EASTERN AIR LINES, INC.

and

AIR LINE PILOTS ASSOCIATION

Appearances

James L. Linsey, Esquire
Russell Hollander, Esquire
Cohen, Weiss & Simon
for the Air Line Pilots Association

Ronald B. Natalie, Esquire
Dean R. Brenner, Esquire
Verner, Liipfert, Bernhard, McPherson & Hand
for Eastern Air Lines, Inc.

Introduction

A pre-hearing conference was conducted on April 8, 1991 involving the above-captioned parties. A hearing had been requested by the Air Line Pilots Association(hereinafter "ALPA" or the "Association") regarding its contention that existing Labor Protective Provisions (hereinafter the "LPPs") contained in an

1.

agreement between the Association and Eastern Air Lines, Inc. (hereinafter "Eastern" or the "Carrier") should be implemented. Specifically, ALP A argued that, in view of Texas Air Corporation's (hereinafter "Texas Air") acquisition of Eastern in 1986 and Texas Air's alleged unification, consolidation, merging and pooling of certain of Eastern's and Continental Air Line's (hereinafter ("Continental") previous separate facilities and the operation of Eastern and Continental as a "double breasted operation" that Eastern, Texas Air and Continental were required to provide for the integration of the Eastern and Continental pilot seniority lists.

Prior to the convening of the April 8, 1991 pre-hearing conference, counsel had furnished the below-signed Arbitrator with substantial correspondence and argument addressed to the Carrier's contention that the subject matter of the Associations' request for arbitration, which would result in the integration of pilot seniority lists under Section 13 of the LPPs, was not properly within the jurisdiction of the Arbitrator, as the question of whether a "merger" had occurred involving Eastern and Continental was properly submitted to the Eastern-ALPA System Board of Adjustment.

During this exchange of correspondence, an issue was raised regarding the interest in this proceeding of other "potential parties", specifically, Continental Airlines, Texas Air Corporation, the Continental pilots, the former pilots of Frontier Airlines, and the former pilots of People Express Airlines. Accordingly, the Arbitrator notified those other

potential parties of the April 8,

2.

1991 pre-hearing conference and invited both Eastern and ALPA, as well as counsel for the other named potential parties to the proceeding, to file brief statements of position on or before April 1, 1991 in which they would address issues they "deemed relevant" for the Arbitrator's consideration.

Continental Airlines filed such a statement and contended that as of December 3, 1990 Section 362 of the Bankruptcy Code, 11 U.S.C. 362, automatically stayed all legal proceedings involving debtors, which included Continental Airlines and its related corporate entities, as the result of the voluntary Chapter 11 reorganization proceedings involving Continental Holdings. Accordingly, Continental contended that no proposed "arbitration" such as that sought by ALPA could proceed without the express approval of U.S. Bankruptcy Judge Helen S. Balick.

Eastern and ALP A filed statements of position and appeared at the April 8, 1991 pre-hearing conference to argue their respective positions regarding the jurisdiction of a Section 13 LPP arbitrator to proceed. The other identified "potential parties in interest", except for Continental as noted above, neither filed any statement of position nor did they participate at the April 8, 1991 pre-hearing conference.

Eastern and ALPA were also afforded the opportunity to file supplemental statements of position subsequent to the April 8, 1991 pre-hearing conference, and they did so.

3.

Background Facts

It is not necessary to analyze in detail or generally the numerous proceedings which were conducted before the Eastern Bankruptcy Court, the federal courts, the Eastern-

ALPA System Board of Adjustment and/or the administrative agencies of the federal government, in which issues arguably related to the LPPs were addressed, in order

to set the stage for this Arbitrator's resolution of the instant dispute regarding the proper forum for hearing the merits of the Association's claim that a proceeding regarding the integration of pilot seniority lists is properly conducted under Section 13 of the LPPs which are contained in the Eastern-ALPA collective bargaining agreement. The relevant findings of those other tribunals will be discussed, to the extent necessary, when the positions of the parties are outlined.

Position of Eastern

The Carrier argues that the question of whether Eastern and Continental are merged, which fact would trigger certain provisions in the Eastern-ALP A collective bargaining agreement (the so-called LPPs), must be decided by the Eastern-ALPA System Board of Adjustment.

The Carrier asserts that the contractual LPPs do not provide for a non-System Board arbitrator as to whether a merger occurred; but that the LPPs only provide for a non-System Board arbitration in the event a merger has occurred which affects employee seniority rights

and if the carrier and employee representatives cannot agree upon an integrated seniority list.

Eastern maintains that as the Eastern-ALP A System Board of Adjustment has been suspended by U.S. Bankruptcy Judge Lifland, in Ionosphere Clubs, et al. v. ALPA, U.S. Bankruptcy Court for the Southern District of New York, Chapter 11 Case Nos. 89 B 10448 and 10449 (August 14, 1990), the instant arbitration cannot go forward.

Eastern contends that only the System Board can

interpret the contract to determine whether a "merger" occurred thus triggering the LPPs.

The Carrier points out that the LPPs are silent as to "who" determines whether a merger occurred, and argues that that silence, as with all other contractual provisions, must be construed as acceptance of the System Board and its procedures if an arbitration is to occur. In support of this contention the Carrier maintains that the language of the Eastern-ALP A collective bargaining agreement and a decision by Judge Sweet of the Second Circuit of the United States Court of Appeals as well as common sense supports a finding that only the System Board can decide this case.

In the event the arbitration does go forward, Eastern submits that the Arbitrator should conclude that Continental and Eastern are not merged. Eastern submits that reference to Eastern, Continental and Continental Airlines Holdings, 17 N.M.B. 432 (1990), supports this contention since the National Mediation Board held, in that

proceeding, that Eastern and Continental do not constitute a single carrier.

In further support of its contention that only the Eastern ALPA System Board of Adjustment can decide "this arbitration", the Carrier cites a decision by U.S. District Judge Nesbitt in which the Court held, adverse to Eastern's position, as follows:

> Under the grievance procedure established in accordance with Section 204 of the RLA, 45 US.C. 184, the System Board has jurisdiction over disputes "growing out of the interpretation or application" of a collective bargaining agreement. Eastern v. ALP A, 670 F. Supp. 947, 953 (S.D. Fla 1987).

Eastern submits that only the System Board can hear matters

and conduct arbitration proceedings concerning the interpretation or application of the Eastern-ALP A collective bargaining agreement.

Eastern argues that the LPPs themselves cannot alter this conclusion, because the question posed is whether, in the first place, the LPPs apply. Eastern maintains that it would prejudice the outcome to hold a non-System Board arbitration pursuant to the LPPs before anyone had decided whether the LPPs were properly invoked.

Citing what it argues to be the relevant provisions of the LPPs, Eastern contends that the language therein does not change the typical System Board procedure regarding the question of whether a merger has occurred.

Referring to Section 2 (a) of the LPPs, which defines the term "merger" as follows:

6.

> The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

the Carrier argues that the provision is silent as to "who" is to decide whether a "merger" occurred; and thus the only appropriate body for such an arbitration is the System Board.

The Carrier also cites Sections 3 and 13 of the LPPs and contends that those sections, which concern direct negotiation (Section 3) and possible arbitration (Section 13), only become effective if there is a merger which affects the

seniority rights of the Carrier's employees.

Eastern argues that it is "safe to say" that the Civil Aeronautics Board (hereinafter the "CAB"), in drafting Section 13 of the standard LPPs, never contemplated that that section of the protective provisions could be read to require an arbitration concerning the question of whether a merger occurred; as that was a question within the CAB's province. The Carrier argues that now, in the absence of the CAB, the question is properly submitted as a matter of contract interpretation to the Eastern-ALP A System Board of Adjustment.

Eastern cites the decision by U.S. District Judge Robert W. Sweet in In re Ionosphere Clubs, Inc., 114 B.R. 379 (SD.N.Y. 1990), and argues that while Judge Sweet held that the Bankruptcy Code's automatic stay did not bar an arbitration concerning whether Continental and Eastern had merged, he did not find that a non-System

Board arbitration has some special legal status or that Section 13 of the LPPs overrides the Bankruptcy Code. Eastern points out that Judge Sweet found that the Carrier had to arbitrate the merger question because it had not sought relief under Section 113 of the Bankruptcy Code. The Carrier submits that not only did Judge Sweet "envision a System Board arbitration to decide whether the LPPs are triggered", but that Judge Sweet explained how the Carrier could, by invoking the procedures of Section 1113, avoid such an arbitration by obtaining relief from the contract from the Bankruptcy Court. Eastern points out that it obtained such relief, and argues that this arbitration cannot go forward in light of Judge Sweet's decision.

Eastern submits that the Second Circuit Court of Appeals in In re Ionosphere Clubs, Inc., 922 F.2d 984 (2nd Cir. 1990),in affirming Judge Sweet's decision insofar as it

related to the LPP arbitration, did not hold that a non-System Board arbitration under Section 13(a) is proper; and that the Second Circuit also presumed that before the LPPs (including the non-System Board arbitration) could afford anyone any protection, an arbitrator must decide whether the LPPs have been triggered.

The Carrier asserts that the decision by Arbitrator Elkouri, sitting as neutral member of the Eastern-ALPA System Board of Adjustment, is not to the contrary; as the System Board decided, in that case, which LPPs were included in the Easter-ALP A contract, and observed that "the question whether there actually has been any merger is not before the Board in the present case. .. ."

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In further support of its position, the Carrier relies upon the position taken by the People Express Pilots Merger Committee, wherein counsel for that Committee observed that "A System Board proceeding under the Eastern pilots' collective bargaining agreement may now be in order".

Based upon the foregoing facts and contentions, Eastern submits that the instant proceeding is a System Board arbitration and cannot go forward while the System Board is suspended.

Briefly addressing the merits, Eastern contends that it has operated independently of Continental as a matter of law and that the Bankruptcy Court, on April 19, 1990, removed Texas Air and its management from controlling or operating Eastern and replaced them by appointing a Chapter 11 Trustee. Eastern submits that the Trustee, as a fiduciary for all creditors, has not and cannot run Eastern in concert with Continental or as a single merged carrier together with Continental. Eastern maintains that the National Mediation Board (hereinafter the "NMB"), in the case cited above, dismissed the Continental-Eastern single carrier case brought by ALPA and other unions for this precise reason. Eastern asserts that there is no need to repeat the NMB' s lengthy

proceeding here, and that ALPA is collaterally estopped from re-litigating the same factual issue decided by the NMB.

In its submission following the pre-hearing conference, the Carrier iterated and further argued that (1) the instant matter concerns a System Board Arbitration, which cannot go forward at this

time because the U.S. Bankruptcy Court for the Southern District of New York has authorized suspension of the System Board, (2) the only proper parties to this proceeding are Eastern and ALPA, as they are the only parties to the collective bargaining agreement incorporating the LPPs, and that ALP A has no legal basis to "force others into this case", and (3) if the merits are reached, the Arbitrator should conclude that Eastern and Continental are not and never were merged, and that this conclusion should be based, in part, upon the NMB' s dismissal of the "single carrier case".

Position of the Association

The Association outlines the history of the dispute regarding the LPPs, and points out that ALP A, in 1985-1986, granted Eastern hundreds of millions of dollars in economic concessions and relief in exchange for "meaningful and effective labor protective provisions".

The Association submits that subsequent to Texas Air's acquisition of Eastern in 1986, Texas Air unified, consolidated, merged, and pooled certain of Eastern's and Continental's previously separate facilities and operated the two carriers as a bona fide double-breasted operation. ALP A contends that this operation clearly affected the seniority rights of the Eastern pilots, and therefore those carriers were obligated to provide for the integration of the Eastern and Continental pilot seniority lists.

The Association then addresses, in detail the history

surrounding the negotiation of the 1985-1986 collective bargaining

10.

agreement between Eastern and ALP A, as well as the Department of Transportation's (hereinafter the "DOT") approval of Texas Air's acquisition of Eastern. ALP A also cites litigation, which arose after the negotiation of the LPPs in 1986, in support of its factual contention that Eastern attempted to repudiate the 1986 collective bargaining agreement and to deny the existence of several portions of that agreement, including the LPPs.In outlining the antecedent facts which led to the instant dispute, ALP A discusses a decision by the Eastern-ALP A System Board of Adjustment, Eastern and ALP A, (ALPA Case No. 1-86, Schulte Grievance, Arbitrator Frank Elkouri, September 22, 1989), in which the System Board found that the collective bargaining agreemen. contained "meaningful LPP protection for pilots as a matter of contractual right"; and that the System Board specifically determined that the agreement contained those labor protective provisions found in Sections 2(a),3 and 13 of the Allegheny-Mohawk LPP Agreement.

In support of its contention that Texas Air operated Eastern and Continental as a "double-breasted operation", ALP A points out that (1) beginning in the fall of 1986 key high level Texas Air and Continental officials were transferred to Eastern, (2) with the transfer of such officials, Continental and Eastern began coordinating their planning, operations and route structures in a manner which had the deliberate and clearly foreseeable effect of transferring work and work opportunities from the more senior Eastern pilots to the less senior Continental pilots, (3) the Bankruptcy

11.

Examiner observed that "Texas Air had anticipated that Continental 'would cherry-pick the core parts of the Eastern

system, and become in effect the substitute carrier'", (4) in the fall of 1986 officials for Eastern, Continental and Texas Air participated in a series of planning and pricing meetings and other conferences in order to eliminate overlapping flying routes and hub operations, (5) between January 1987 and July 1988 Eastern reduced it relative competition with Continental by 60.8%, (6) an example of Eastern's transfer of operations, work and work opportunities to Continental is found in the transfer of Eastern's Miami-London route to Continental, (7) subsequent to Texas Air's acquisition of Eastern, the number of pilots at Eastern steadily declined from over 4,200 pilots in the fall of 1986 to 3,512 pilots by the second quarter of 1988, and that during the same time frame the number of pilots employed by Continental increased by more than 125%, (8) Eastern entered into an agreement in the late summer of 1989 in which Eastern leased aircraft from Continental, which aircraft were crewed by Continental pilots, and that this arrangement, known as a "wet-lease", was an arrangement in which Eastern had never previously participated, and (9) Eastern's wet-leasing increased in 1989 and for the then indefinite future, which wet-leasing resulted in several hundred senior Eastern pilots, who had previously participated in a sympathy strike in support of Eastern's striking machinists, being "locked out" as Eastern maintained that it had "too many pilots".

12.

ALP A submits that, as the result of Eastern, Texas Air and Continental's adamant refusal to meet pursuant to Section 3 of the LPP agreement, the Association was required to request the NMB to proffer a list of arbitrators from which a neutral arbitrator would be chosen to settle the dispute; and that after additional litigation in which the carriers cited the Bankruptcy Court's automatic stay of litigation, the United States Court of Appeals for the Second Circuit in In re Ionosphere Clubs, Inc., 922 F.2d 984 (1990) ordered Eastern to submit the LPP dispute to arbitration.

The Association then outlines the three issues it contends are properly before the Arbitrator. Simply stated, they are (1) whether the alleged double-breasted operation of Eastern and Continental constitutes a "merger" as defined in Section 2(a) of the LPPs, (2) whether the alleged double-breasted operation required Texas Air, Eastern and Continental to make provision for the integration of pilot seniority lists, and, if so, what should those provisions be, and (3) did the implementation of the alleged double-breasted operation require the carriers to "make whole" those pilots at Eastern who have been "wrongfully deprived of work and work opportunities" as the result of the carriers' prior refusal to make provision for the integration of seniority lists.

ALPA contends that as of February 23, 1986 it was acutely aware that Eastern might be sold to Texas Air, and that because of the Association's previous encounters with Texas Air Chairman Francisco Lorenzo, ALP A, in order to fully protect the interests of Eastern

pilots, proposed and obtained meaningful labor protective provisions. Citing the parties' definition of the term "merger", the Association submits that the dramatic transfer of vast amounts of Eastern revenue flying to Continental, through the transfer of routes, work and work opportunities, requires the Arbitrator to find that Eastern and Continental merged within the broad definition of Section 2(a) of the LPPs. ALPA requests that the Arbitrator order Eastern, Continental and Texas Air to make provision for the integration of pilot seniority lists and to grant Eastern pilots such further relief as the Arbitrator deems just and appropriate.

In its submission following the pre-hearing conference, ALPA asserts that Eastern had frustrated and delayed the Association's attempt to adjudicate its claim that, pursuant to the LPPs, Eastern, Texas Air and Continental are required to make provisions for the integration of the Eastern and

Continental pilot seniority lists. In support of this contention, ALP A refers to the decisions of the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit which "squarely held" that Eastern is obligated to submit the LPP dispute to arbitration.

The Association disputes Eastern's contention that the Eastern-ALPA System Board is the appropriate forum for determining whether Eastern and Continental have merged operations. ALP A argues that Section 13(a) of the LPP agreement, which states that "any dispute or controversy. . . [which] arises with respect to the protections

provided" may be referred by any party to an arbitrator selected from a panel furnished by the NMB, establishes that the dispute in the instant case is properly before the Arbitrator. The Association argues that the clear and unambiguous language of the LPP agreement provides that "all" disputes arising out of or concerning the interpretation or application of the LPP agreement shall be resolved by a single arbitrator selected from a list furnished by the NMB, and not by the five-member System Board of Adjustment.

ALP A asserts that it has consistently, without exception, adhered to its position that the instant dispute should be heard by a single arbitrator selected in accordance with Section 13 of the LPP agreement.

ALP A maintains that Section 13 of the LPP agreement provides the broadest possible jurisdiction so that an NMB arbitrator may interpret whether a breach of the LPP agreement has occurred and to then remedy that breach fully. The Association argues that Eastern's attempt to bifurcate the instant dispute before different tribunals defies the spirit and intent of the LPP agreement.

Citing decisions of the United Sates Courts of Appeals, the Association contends that it is well-settled that Section 13 arbitrators have jurisdiction akin to that of a System

Board of Adjustment. The Association submits that its claim that Texas Air "merged" Eastern and Continental within the broad definition of Section 2(a) of the LPP agreement requires a neutral to interpret the "scope and meaning" of that agreement; and that pursuant to Section

15.

13 (a) of the LPP agreement, that neutral shall be "an arbitrator selected from a panel of seven names furnished by the National Mediation Board". The Association contends that this position is supported by the decision of U.S. District Judge Sweet, who, at oral argument, informed Eastern's counsel that the "merger" question was "perfectly appropriate for . . . an NMB arbitrator."

The Association maintains that common sense dictates that its claims be heard by a Section 13 arbitrator. The Association points out the inappropriateness of submitting an LPP claim through the ordinary grievance procedure which terminates in proceedings before a System Board of Adjustment. Additionally, the Association points out that a NMB arbitrator has the power to bind all affected parties, while the System Board can only bind Eastern and ALPA.

Citing litigation involving Texas Air and the People Express pilots, which litigation the Association claims provides guidance in the instant dispute, the Association points out that the United States District Court for the District of New Jersey, in People Express Pilot Merger Committee v. Texas Air, 127 LR.R.M. (BNA) 2879 (1987) held that oral representations made by Texas Air Chairman Lorenzo to the People Express pilots bound the subsidiary carrier to such agreements; and that in subsequent litigation the district court joined the Continental pilots as an indispensable party and ordered Texas Air, People Express, Continental and all affected pilots to submit to a Section 13 arbitration.

16.

Based upon the foregoing facts and arguments, the Association submits that the Arbitrator should reject Eastern's claim that the instant dispute is not ripe to be adjudicated fully.

Findings and Opinion

The parties have agreed upon very little in this case. They interpret the various, arguably relevant decisions of the federal courts quite differently. However, they do seem to agree that only one of two forums is the appropriate tribunal to resolve the question of whether Section 2(a) of the LPPs , contained in or made a part of the Eastern-ALP A collective bargaining agreement, is applicable to the facts in the instant case; and if Section 2(a) is applicable, what results are triggered by the application/implementation of Section 13 of the LPPs. There has been no contention that any tribunal other than the Eastern-ALPA System Board of Adjustment or this Section 13 LPP Arbitrator has jurisdiction to determine whether a "merger", as defined in Section 2(a) of the LPPs, occurred, and, if so, what would be the labor protective consequences of such action.

After careful consideration of the parties' arguments and scrutiny of the numerous cases and authorities cited, this Arbitrator concludes, for several reasons, enumerated below, that jurisdiction more appropriately lies here for resolution of all questions regarding the application and possible implementation of the labor protective provisions agreed to by the parties.

17.

Eastern correctly points out that the CAB, in drafting Section 13 of the standard LPPs, never "contemplated" that that Section of the protective provisions could be read to require that there be an arbitration held in which the competing parties would argue the question of whether a

"merger" occurred. Eastern correctly points out that that question fell within the exclusive province of the CAB.

It is reasonable to conclude that when the CAB originally drafted Section 13 of the Standard LPPs that agency never "contemplated" that the United States Congress and the executive branch of the federal government would eliminate the CAB as a regulatory agency, and leave many questions concerning employee protective conditions in a relative legal and administrative vacuum. If the CAB had contemplated that the question of whether a "merger" had occurred, for purposes of applying and/or implementing labor protective provisions, was to be properly resolved by an arbitration tribunal, it is more likely, in this Arbitrator's opinion, that the CAB would have directed such an issue to a forum where all parties with a potential interest in the outcome would have the opportunity to participate; a forum such as Section 13, which the CAB, in its wisdom, established.

A system board of adjustment, established under Section 204 of the Railway Labor Act, is created for the purpose of resolving "claims and grievances" which arise out of disputes regarding the proper implementation and application of the terms of a collective bargaining agreement.

18.

Except in circumstances when another labor organization's contract might be implicated by a grievance filed by a different union, there is virtually no situation which would permit a Railway Labor Act board of adjustment to bind parties other than those signatory to the contract by that board's findings and decisions. Those cases, in which more than the carrier and grieving organization appear before a board of adjustment to present their respective positions, almost always involve so-called "craft jurisdictional" disputes. They do not involve intra-craft disputes, such as seniority integration, and they do not involve circumstances where another carrier, claiming to be an independent entity, is joined in interest before the board

of adjustment. For these reasons, this Arbitrator concludes that a board of adjustment would not have the authority to compel non-parties to the system board of adjustment agreement to appear before it; nor would the neutral member of a Railway Labor Act board of adjustment, in the face of an objection by one of the parties on the board agreement to appear and present evidence and argument to the board.

Here, the essence of the Association's claim and the relief it seeks is that Eastern pilots be granted equity rights in the flying being performed by Continental pilots. The Eastern-ALPA System Board of Adjustment, assuming arguendo that it heard and concluded that a "merger", as defined by Section 2(a) of the LPPs, occurred, would not

have the authority, in this Arbitrator's opinion, to "grant" the relief requested by the Association.

Additionally, the Association's claim in the instant case does not meet the standard indicia of a "grievance". The Association does not appear to have alleged, before this Arbitrator, that Eastern violated a specific term or condition in the collective bargaining agreement, which violation would require monetary, injunctive or some other form of relief typically sought in matters submitted to system boards of adjustment.

This Arbitrator recognizes that the Association did, in fact, by letter dated March 28, 1991 file a "group grievance" regarding the same subject matter that is here under consideration. However, in filing that grievance the Association "expressly reserve[d] the right to pursue such other remedies as may be available under applicable law in other forums", and the Association filed that grievance "without prejudice to the exercise of such rights by ALP A" and noted that the grievance should not be "construed as a waiver of ALPA's right to proceed in any other appropriate legal forum".

It is this Arbitrator's opinion that the group grievance

filed by ALPA does not act as a waiver of its right to proceed before this Arbitrator in this forum; and that balancing the interests of all potentially impacted parties, it is this Arbitrator's conclusion that the Section 13 forum is a more appropriate tribunal to hear and consider the evidence and the arguments of competing interests regarding the questions of whether a "merger", as defined in Section

2(a) of the LPPs, occurred, and, if so, what actions or remedies should be followed or directed.

Eastern has argued that the decision by the NMB, in which it was found that Eastern and Continental did not constitute a single carrier, collaterally estops the Association from proceeding in the Section 13 LPP forum. This Arbitrator disagrees. The NMB' s jurisdiction regarding "single carriers" is derived from Section 2, Ninth of the Railway Labor Act. The NMB was not asked to interpret the cited sections of the Eastern-ALPA LPPs, and if it was it is reasonable to conclude that the NMB would have declined such an invitation.

It will be necessary to take evidence and hear argument regarding the standards to be applied and the benchmarks to be met, if the Association is to establish that Section 2(a) of the LPPs is applicable to the alleged "double-breasted operation" of Eastern and Continental. At this time, this Arbitrator cannot conclude that the issues decided by the NMB and the issues which will be presented and argued in this forum are identical, and are, therefore, arguably subject to the legal principle of collateral estoppel.

Finally, Continental has urged that the proposed "arbitration" sought by ALP A here cannot proceed without the express of approval of U.S. Bankruptcy Judge Balick. Without derogation to the authority and jurisdiction of the Bankruptcy Court, it is noted that both Eastern and ALP A have acknowledged that the decision by U.S. District Judge Sweet in In re Ionosphere Clubs, Inc., 114 B.R. 379

(S.D.N.Y.)

21.

1990) found that the Bankruptcy Code's automatic stay did not bar an arbitration concerning whether Continental and Eastern had "merged", and that that decision has vitality today. Therefore, while this Arbitrator disagrees with Eastern's assertion that Judge Sweet "envisioned" a system board of adjustment proceeding, it is this Arbitrator's opinion that there is no bar to a Section 13 LPP proceeding going forward in which all relevant issues regarding the application and implementation of the LPPs are considered.

Accordingly, this Arbitrator finds merit in the Association's contention that Section 13 of the LPPs is the proper forum for hearing the issues related to the Association's petition for a seniority integration proceeding and other remedies which might be appropriate.

Arbitration hearings will be scheduled after consultation with all parties who establish a right to participate. If the parties cannot agree upon a mutually convenient schedule, the Arbitrator will establish such schedule.

These Findings were issued this 4th day of August, 1992.

s/s: Richard R. Kasher
Richard R. Kasher, Arbitrator

22.

(2) Supreme Court, U.S.
FILED

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No._____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RAMON E. O'NEILL

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

and

JAMES BALDRIDGE; WILLIAM MANN; LARRY DUNN, individually and as representative of a class of persons similarly situated who are referred to as LPP CLAIMANTS.

Respondent.

On Petition For A Writ of Certiorari To The United States Court OF Appeals For The Third Circuit
VOL II

PETITION FOR A WRIT OF CERTIORARI

Ramon E. O'Neill, *Pro Se*
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PEOPLE EXPRESS PILOT MERGER COMMTTEE	)	
	)	
and	)	
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	)	AWARD
and	)	
	)	
FRONTIER PILOT MERGER COMMITTEE	)	
	)	
and	)	
	)	

CONTINENTAL AIRLINES, INC.

Appearances:

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Ellen Ranzman, Esq.
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For the Continental Pilot Merger Committee
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Merger Committee Members

People Express Pilot Merger Committee
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- Steve Abdu
- Jim Brucia
- Mark Cleppe
- Michael Hynes
- Spence Kershaw
- Jay Malloy

Continental Pilot Merger Committee
- Neil Miller, Chairman
- Joseph J. Birmingham
- Carl Christensen
- Charles Higdon
- Tom Stephens
- Jack Stice

Frontier Pilot Merger Committee
- Robert L. Williams, Chairman
- Douglas A. Bader
- Roger Brooks
- Dave P. Kaplan
- Robert L. McCoy
- Billy J. Watkins
- Michael L. Waldron

Continental Airlines, Inc.
- Robert P. Lemon
- Sam Peckham
- James Cato, Esq.

Background

This matter is before the undersigned, Jerome H. Ross, following a Federal District Court Order Compelling Arbitration of the Integration of Pilot Seniority Lists of Continental Airlines, People Express Airlines and Frontier Airlines Pursuant to the Provisions of the Labor Protection Agreement.*

On September 15, 1986, the Texas Air Corporation (Texas Air or TAC) and People Express, Inc. (PEI) entered into a merger agreement.** On the same date, TAC and PEI entered into a Labor Protection Agreement (LPA) in order "to provide assurances to the employees of the air carrier subsidiaries of PEI with regard to their seniority interests in the event of any future merger of airline operations involving any air carrier subsidiary of PEI." The LPA further provides for "fair and equitable seniority integration procedures" in the event of any such future merger. It also provides for a "final and binding decision by a Neutral Mediator"*** in the absence of agreement of the parties. The LPA also requires that a separate

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* United States District Court for the District of New Jersey, Civil Action No. 87-1155, Hon. Nicholas H. Politan, August 7, 1989.

** People Express Airlines, Inc. became the operating subsidiary of a newly formed holding company, People Express, Inc. on August 28, 1985.

*** The Court and the parties recognize that the appropriate title is Neutral Arbitrator.

procedure be conducted by the seniority integration committees for each craft or class of employees on each carrier participating in the merger. It further provides for the surviving merged carrier to participate as a party to the selection of the neutral and as a party to the proceedings.

On December 30, 1986, Texas Air, the parent corporation of Continental Airlines (the Company, Continental or CAL) formally acquired People Express Airlines, Inc. (People Express or PEX) from PEI. PEI became a wholly-owned subsidiary of Continental which remained a wholly-owned subsidiary of Texas Air.*

On March 12, 1987, Continental issued a memorandum proposing to unilaterally merge the seniority lists of the CAL pilots and the PEX pilots in the event of a consolidation of CAL and PEX operations. The list placed the top 295 PEX captains below the junior CAL captain. The remaining 162 former PEX captains were integrated into the list below the junior CAL first officer, and the remaining PEX pilots followed these former captains. The bottom of the list was composed of an estimated 1000 pilots who were to be hired in 1987 and thereafter.

The PEX pilots, represented through the People Express Pilot Merger Committee (PEX Committee), challenged the Company's list in Federal District Court. On June 15, 1987,

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* On July 11, 1989, PEI was merged with PEX and CAL was then merged with PEX. The surviving entity was renamed Continental Airlines, Inc.

the Court denied the PEX Committee's application for a preliminary injunction.

When the PEX Committee moved to enjoin the Company from implementing its lists, TAC was in the process of merging the operations of CAL and Frontier Airlines (Frontier or FAL). On June 15, 1987, Arbitrator George Nicolau issued an Opinion and Award rendering an integrated seniority list for the pilots of Continental and Frontier.

On July 10, 1987, the Company announced a revised seniority list integrating CA and FAL pilots pursuant to the

Nicolau award and integrating CAL and FAL pilots pursuant to the Nicolau award and integrating the PEX pilots as reflected under the current seniority list in the following order: 1675 CAL captains; 162 FAL captains and 295 PEX captains (integrated by date of hire, which places all FAL captains ahead of PEX captains); 299 CAL first officers (pursuant to the Nicolau award); 1262 additional CAL, FAL and PEX first officers (pursuant to the Nicolau award ratio for the first 1056 CAL and FAL pilots, and by date of hire for the remaining FAL and PEX pilots,*); 162 PEX second officers and Flight Manager Representatives (FMRs) and 508 CAL new hires. A more specific breakdown of the Company's seniority list is set forth under the section on Proposed Seniority Lists.

On October 14, 1987 the District Court ordered that the CAL pilots were a necessary party to an arbitration pursuant to the provisions of the LPA.

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* The PEX Committee claims that the first 162 of these former PEX pilots are downgraded captains.

System Bid 87-3, the first opportunity for PEX pilots to bid under the integrated flight operations, was announced on October 23, 1987.

On October 24, 1988, the Court certified the PEX Committee as the plaintiff class representative for all pilots employed by PEX as of March 12, 1987. The Court, on November 15, 1988, granted a motion for intervention filed by the Frontier Pilots Litigation Steering Committee (FPLSC) on behalf of the FAL pilots. The FAL pilots are represented in this Arbitration by the Frontier Pilot Merger Committee (FAL Committee). On April 24, 1989, the Court also certified the FPLSC as a representative of all CAL pilots, excluding PEX pilots. On the same date the Court granted the PEX Committees motion to compel arbitration.

Pursuant to the Court's Order Compelling Arbitration,

dated August 7, 1989, the undersigned Arbitrator was selected from a list provided by the American Arbitration Association. The Order provides for the participation of the PEX Committee, the FAL Committee, the Continental Pilot Merger Committee (CAL Committee) and Continental.

On February 1, 1990, at a prehearing conference, Continental filed a Motion in Limine seeking enforcement of Arbitrator Nicolau's Award of June 15, 1987, which rendered an integrated seniority list for the former FAL pilots and the CAL pilots. The motion was granted by the undersigned on February 26, 1990, thereby requiring that

the FAL pilots not argue for any change in their seniority relative to other non-PEX pilots at Continental, as determined in the award of June 15, 1987. By District Court Order dated May 14, 1990, the FAL pilots' motion to reverse this decision was denied.

Hearings before the undersigned Arbitrator were held in Washington, D.C. on the following dates in 1990: May 7-11, 15-16 and 21-24; June 4-8 and 11-15; July 9-13, 16-19 and 30; August 1-3; September 12-15, 17-21 and 30; October 1-6 and 15-19; November 5-6, 8, 10, 12, 14-15, and 27-30; and December 14-15. In 1991, hearings were held on January 7, 14 and 26; February 7, and March 2. Post hearing briefs were filed on April 2, 1991. Reply briefs were filed on April 15, 1991.* Oral argument was held on April 29, 1991. Technical support committee sessions were convened on June 14 and 27; July 11, 12 and 15 and August 7-8, 1991.

Historical Overview

This section highlights the facts and circumstances under which four airlines relevant to this integration – Continental, PEX, Frontier and New York Airlines (New York Air or NYA) – came into existence and operated.**

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* Under the briefing procedures, the FAL Committee filed its opening brief on April 15, 1991, and it incorporated its reply arguments into its oral argument on April 29, 1991.

** The relevance of NYA, which is not specified in the District Court Order, is addressed in the section on Discussion and Findings.

7

People Express

A unique chapter in the history of the domestic airline industry was written following passage of the Airline Deregulation Act of 1978 when People Express introduced a new concept in air travel.

People Express was incorporated on April 7, 1980. Its application to the Civil Aeronautics Board for permission to form a new airline listed the following objectives: (1) provide a broad new choice of flights with high frequency service; (2) keep costs low by extremely productive use of assets; (3) offer unrestricted deep discount price savings through productivity gains; (4) focus on several high density markets in the eastern United States which had not benefited from deregulation; and (5) center operations in the New York/New Jersey metropolitan area with its highly concentrated population and use the under-utilized, uncongested and highly accessible Newark International Airport as its main base.

These objectives would initially result in People Express providing frequent service to underserved cities, especially those with industrial markets, primarily in the northeast. In order to attain these objectives, management concentrated on reducing costs to a bare minimum in every aspect of the operation. All seats were sold for one deeply discounted price, which PEX termed "unbundled service" and which today is commonly known as "no frills." A difference in fares was charged for peak and

off peak hours. Fares were collected in flight, as opposed to using ticket counters and agents. Customers were charged for all in flight food and drink services and baggage checking. There were no hot galleys in the planes.

PEX's first flight service began on April 30, 1981, with three planes flying between Newark, Buffalo, Columbus (Ohio) and Norfolk. By 1982, People Express had over 1,200 employees, owned 17 aircraft and serviced 18 cities.

In addition to insuring the highly productive use of employees and the fleet, management implemented a labor relations philosophy which did not include union representation for employees. Rather, management's objective was to motivate employees to be highly efficient by making every employee a "manager" and an "owner" of the company. As such, employees performed more than one type of duty under the concept of cross utilization. For example, pilots had the job title of Flight Manager. Although their primary job was to fly planes, they were assigned duties in other functional areas (such as scheduling, air traffic, reservations or insurance) on an average of four days monthly in addition to their regular flying duties of from 80 to 86 hours each month. By 1986, many pilots were not required to work outside their flying duties. Flight attendants, with the job title of Customer Service Manager, also were cross utilized to perform duties such as fare collection on the aircraft. Employees responsible for overseeing the maintenance of aircraft carried the

Maintenance Manager job title. The Company also hired interns in six different functional areas of the operation.

Beyond the managerial concept, every new employee was required to purchase 100 shares of PEX common stock at greatly discounted prices, thus instilling the concept of ownership in all employees. In 1985, People Express employees controlled over 26 percent of the company's voting stock shares.

Employees were provided 100 percent medical and dental coverage, a profit sharing plan and other stock option bonuses and plans. The company did not offer an employee pension plan. The company's stated, although unwritten, policy was to not furlough or involuntarily downgrade employees.

In an effort to provide pilots their aircraft preferences, the company established a system which offered selection opportunities for pilots who had been hired in classes of from two to 15 employees beginning in 1981 through August 1983. The system was geared to classes in which every class member became a captain on the same date, as opposed to individual dates of hire and strict individual seniority. The system required consensus in a pilot group to resolve conflicts where all pilots could not receive their aircraft preferences. In 1983, the company implemented a new computerized bidding system, Selective Lines Individually Constructed (SLIC), which later was designed to customize flight lines based on individual

pilot requests. By 1985, a lottery system, in which seniority played no part, was implemented for bidding on flight lines.

The location of PEX's corporate offices at Newark International Airport also was consistent with the effort to operate potentially productive assets at a minimum cost. Although the airport is located in the New York City metropolitan area, it largely had been ignored. People Express inexpensively purchased a building on the airport premises to house its corporate offices. The offices were sparingly furnished and staffed. There were no secretaries, and every employee performed clerical and secretarial duties. A basis computer system was used to maintain passenger seat reservations.

The concept of a Newark hub for passenger exchange to the spokes in the People Express system proved very efficient. As the number of PEX flights increased, the

company significantly contributed to the development of a more efficient air traffic system and an improved air flow control system in the congested New York City area.

The initial success and growth of PEX resulted in net incomes of $1 million in 1982 and $10.4 million in 1983. During 1983, PEX acquired 37 B-727-200 aircraft from other airlines. It began service to London with a B-747-200 at fare prices which received wide public acceptance. The company's fleet, all previously owned, had increased to: 37 B-727-200s, five B-737-200s and one B-747-200. By the spring of 1984, PEX had 150 daily departures form Newark

-- more than any other carrier in the New York City area. In 1985, PEX and the Port Authority of New York and New Jersey (Port Authority) entered into an agreement to contruct Terminal C which PEX agreed to lease for 25 years. International service to Brussels and Montreal was added to the system. On November 22, 1985, PEI acquired Frontier, gaining a major hub in Denver, but also engaging in fierce competition there against Continental and United Airlines. In December 1985, PEI entered into an agreement to purchase Britt Airways, at the time the nation's third largest regional commuter line which served 29 mid-western cities. Within months it had completed the purchase of Provincetown-Boston Airlines (PBA). In 1986, the company joined the American Airlines Sabre reservation system, announced a frequent flyer program and offered first class airport lounges.

By January 1986, People Express was flying one million passengers a month, the fifth largest domestic airline by this measure. Its operating revenues had increased by two-thirds from 1984 to 1985. Plans were being implemented to construct Terminal C, which would become the largest airline passenger facility in the northeast.

However, the company was experiencing problems associated with its rapid growth. Overbooking, inadequate

terminal facilities in Newark and erratic departure and arrival times depressed profits in the last quarter of 1984

and the first quarter of 1985. There is also evidence that during this period employee morale was dropping from its previous high levels.

The Company experienced very substantial operating and net losses in the last quarter of 1985 and the first two quarters of 1986. With the increased decline in the company's financial condition, in June 1986 PEI retained an investment banker to seek a buyer for PEX and concurrently develop a new business plan to incorporate fundamental changes in its policies and practices – a move which had become necessary to the survival of the company. By the summer of 1986, People Express had reversed its no frills policy and had developed a plan to become a more traditional multi-class service carrier in the face of severe financial problems. After rejecting a TAC offer to buy PEX and Frontier, PEI agreed to sell Frontier to Untied in June 1986, but the transaction was never completed.

On September 15, 1986, PEI and TAC entered into a merger agreement under which TAC ultimately acquired PEX for $113.7 million, -- the figure having been lowered twice from the initial $122.1 million purchase price. PEX stockholders approved the action on December 29, 1986. TAC also purchased Frontier in the same transaction.

Continental

In 1937, a small carrier from El Paso to Pueblo, Colorado began operating under new ownership as Continental

Airlines. By 1961, Continental had added several cities in

Texas and New Mexico, as well as Wichita, Tulsa, Chicago, and Los Angeles. The airline grew steadily between 1966 and 1977, and it added several Pacific routes. From 1977 to 1982, Continental's financial situation increasingly worsened as the Company had difficulty in adapting to the effects of airline deregulation. Several merger attempts following deregulation were unsuccessful. In 1979 Continental began service in the northeast with flights to Newark from Denver and Houston. The Company's losses in 1979 through 1981 were significant.

In 1947, another carrier, Trans-Texas Airlines, began service to eight cities in Texas and later expanded to cities in Arkansas, Louisiana, Mississippi and Tennessee. In the late 1960s and early 1970s, Trans-Texas began service to Monterrey (Mexico), Denver, Los Angeles, Salt Lake City and Mexico City. In 1969 the Trans Texas name was changed to Texas International Airlines (TI). In 1972, Jet Capital Corporation, headed by Frank Lorenzo, gained voting control of TI which had posted large losses since 1968. Under Jet Capital, TI evolved into a low cost, low fare carrier and grew significantly during the 1970s and early 1980s. During 1978 and 1979, TI launched an unsuccessful effort to acquire National Airlines, but realized a large profit through the sale of the National stock it had acquired.

In 1980, TI created a holding company, Texas Air Corporation. Texas Air, in turn formed New York Air,

which it operated as a separate, non-union subsidiary offering a simple low fare structure and high frequency service.

In March 1982, Texas Air assumed control of Continental, which was deep in financial difficulty, and partially guaranteed Continental's debt. Texas Air itself, however, was incurring operating losses at the time of the merger with Continental.

On October 31, 1982, Continental and TI merged as

Continental to become the sixth largest carrier in domestic revenue and passenger miles. Texas Air, the holding company which had been created in 1980, had two subsidiaries, Continental Airline Corporation and NYA. Continental continued to operate at a loss in 1982.

By summer 1983, Continental had suffered heavy losses which TAC agreed to partially guarantee. Relations between Continental and its unions were poor, and the International Association of Machinists struck the Company. On September 2, 1983, Continental suspended operations and filed for bankruptcy. It resumed operations under Chapter 11 on September 27, 1983, with a two-thirds reduction in fleet, staff and number of cities it serviced. Moreover, it unilaterally implemented "emergency work rules" which cut wages and increased productivity, notwithstanding an existing collective bargaining agreement with its pilot union. In protest against the pay cuts, loss of seniority rights and other work rules, Continental pilots initiated a strike

which remained in effect for almost two years. In October 1985, Continental and the Air Line Pilots Association (ALPA) negotiated a strike settlement which provided the pilots a choice from the following three options: (1) waive all claims against the Company and return to work as vacancies occurred; (2) receive severance pay in lieu of returning to work; and (3) not waive claims against the Company and return to work after all option (1) pilots have returned or be removed from the hiring lists on December 31, 1988.

While operating in bankruptcy, Continental began to deeply reduce its fares. The move was very successful in attracting passengers. During 1984, with financial backing from Texas Air, Continental began to rebuild its system by adding cities and increasing flights. In August 1985, Texas Air launched a new carrier, Continental West Airlines, as a

full-service, low fare operation. Continental, still operating under bankruptcy rules, attempted to acquire 30 jetliners, but initially was able to sublease only four, with additional leasing arrangements contingent on court review of its financial and operating performance during the first half of 1985.

After February 1986, when Texas Air had bid successfully for Eastern Airlines, several other airline mergers were announced as companies were restructuring in an effort to attain "supercarrier" status in order to successfully compete in the market place. In acquiring Eastern,

Texas Air was required to sell the shuttle service operated by NYA.

On September 2, 1986, Continental emerged from bankruptcy with two main hubs at Houston and Denver, 40 percent larger than in 1983 when it had entered bankruptcy, and with plans to add to its fleet, as well as with a long term debt service obligation of almost $2 billion.

With the acquisitions of People Express and Frontier on September 15, 1986, Continental strengthened its presence in the east coast markets, gained major hubs in Newark and Denver, and achieved the critical mass required to attain supercarrier status. On February 1, 1987, PEX and NYA operations were merged into Continental.

Frontier

Monarch Airlines began serving Denver, Salt Lake City and Albuquerque in 1946. A bankruptcy was averted in 1947 when the airline was sold. In 1949, Monarch acquired Arizona Airlines and Challenger Airlines. The three carriers combined to form Frontier Airlines. By 1956, Frontier served 68 cities and had 700 employees. Controlling interest in Frontier was sold in 1958 for $750,000 and again in 1964

for $2.5 million when RKO General, Inc. (a subsidiary of General Tire Co. of Akron, Ohio, later to become GenCorp) bought 56 percent of Frontier for $6.5 million. RKO General remained the majority stockholder until the airline was sold to PEI in 1985.

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During the 1960s, Frontier gained a reputation as an on time airline providing a high standard of service to many small and remote locations. In 1967, Frontier merged with Central Airlines. By the end of the 1970s, 53 of Frontier's 89 cities were government-subsidized. In 1979, Frontier registered record profits and began preparing for operation under deregulation by terminating service to several cities and adding others. In 1981, Frontier again set new earnings records and began serving larger cities such as Los Angeles, Seattle, Atlanta and Detroit. In 1982, Frontier became a subsidiary of Frontier Holdings, Inc. In 1983, as a result of a fare war in Denver between United, Continental and Frontier, Frontier Holdings posted a $13.8 million loss – its first in 12 years. The Denver battle continued into 1984 during which Frontier employees agreed to heavy wage concessions and the airline posted a $31 million loss. In 1984, Frontier Horizon, a non-union carrier subsidiary of Frontier Holdings, began service out of Denver.

The situation worsened in 1985. Attempts at an employee buyout plan failed as Texas Air tendered a share offer in excess of the employee offer. However, PEI outbid Texas Air and purchased Frontier in October 1985, using $200 million in cash from Frontier to fund the $309 million purchase. In a concurrent transaction, PEI and Frontier and its unions entered into an agreement which provided in part that: no further wage reductions or

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furloughs would be implemented; Frontier would not be

merged with Continental, nor would it be sold to TAC/CAL; PEI would not sell Frontier assets in excess of $25 million; and PEI would provide sufficient working capitol to operate Frontier as a viable entity.

Frontier's losses increased under a new marketing strategy of deeply discounted fares and no frills service led by a new president selected by PEX Chairman Donald Burr. By May 1986, the marketing strategy was reversed as premium coach service was begun.

Following a $58.9 million loss in the first half of 1986, PEI, after having rejected a prior TAC offer to buy PEX and Frontier, announced tentative agreement to sell Frontier to United for $146 million. The purchase required United and its pilots to reach agreement on the wages and other terms under which the Frontier pilots would be employed at United. Their discussions continued until late August 1986. Although agreement was not reached, PEI received approximately $47 million from United for the sale of various Frontier assets.

On August 24, 1986 Frontier ceased operations, and it filed for bankruptcy on August 28, 1986.

On September 15, 1986, Texas Air agreed to purchase Frontier for $176 million in conjunction with the People Express acquisition.

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New York Air

In December 1980, New York Air began operations as a subsidiary of Texas Air which owned 67 percent of NYA's common stock. NYA had leased six DC-9s from Texas Air to begin service between New York and Washington, D.C., Baltimore, Buffalo, Cincinnati, Cleveland, Detroit and Louisville, and between Boston and Washington, D.C. and Baltimore, and between Baltimore and Orlando. Texas Air initially provided NYA with $10 million of equity capital and agreed to guarantee a $15 million line of credit.

The NYA and PEX operating plans were similar in that both offered low fare, high frequency service based on high productivity, efficiency and simplicity of operations.

New York Air incurred an $11.6 million loss during its first year in operation. In January 1982, Texas Air purchased an additional $8 million of NYA convertible preferred stock. NYA's net operating loss for 1982 was $23 million. During 1983, NYA's fleet composition changed under leasing and sub-leasing arrangements with Texas Air, resulting in eight MD-80s moving from NYA to Continental. Moreover, NYA used two of Continental's Washington National Airport slots during 1983. Although NYA showed a $4.5 million net operating profit in 1983, it experienced a $6.8 million net operating loss in 1984. In 1985, Texas Air acquired the remaining shares of NYA's common stock. NYA's 1985 net loss was $2.4 million.

In order to acquire Eastern in 1986, Texas Air was required to sell the Eastern shuttle service to Pan Am. The agreement between Texas Air and Pan Am was signed on September 12, 1986. The NYA shuttle operation was moved to Newark after Texas Air sold Pan Am 19 NYA arrival and departure slots at Washington National, 56 NYA arrival and departure slots at La Guardia and access to two NYA gates at Logan for $62.8 million. NYA showed a net profit of $36 million in 1986.

NYA was merged into Continental in February 1987. During its brief history, NYA started and ceased service from Boston, New York or Washington, D.C. to 82 cities.

TAC-PEI Merger Agreement

The TAC-PEI merger agreement, dated September 15, 1986, was one of the most complicated acquisitions in airline history. It set forth numerous terms and conditions which required PEI to use its best efforts to preserve People

Express operations and to refrain from attempting to sell the operation to another party. The agreement further required PEI to represent that PEX was a failing company for purposes related to merger and anti-trust considerations. The agreement established several conditions precedent to effecting the merger, such as: (1) approval by PEI stockholders; (2) DOT approval of the merger; (3) agreement of the Frontier unions; (4) acquisition by TAC of Frontier assets through bankruptcy court

approval; (5) PEI remaining out of bankruptcy and continuing to pay its debts as they became due; (6) PEI not ceasing or suspending any significant portion of its operations or business; (7) PEI using its best efforts to obtain waivers of default from its banks, and (8) TAC receiving waivers of claims of Frontier pilots arising out of the October 1985 agreement with PEI. It also required PEI to refrain from soliciting any other offers of purchase. As part of the agreement, PEI granted TAC an option to purchase a new issue of People Express convertible preferred stock, representing approximately 30 percent of the PEX voting power, exercisable while the merger agreement was in effect upon the occurrence of certain events.

The record further reflects that the merger agreement was renegotiated by the parties twice after September 15, 1986. In October 1986, TAC initiated discussions to renegotiate the terms of the agreement following PEX's heavy losses in September. As a result of the discussions, the amount paid by TAC was reduced. The PEX board of directors approved the renegotiated terms on November 2, 1986. Later in November, TAC again renegotiated lower terms which were approved by the PEX board on November 28, 1986.

Events Following the Merger Agreement

Certain events involving seniority integrations at

Continental, which bear on the present proceedings,

occurred after the September 15, 1986 merger agreement.

On October 2, 1986, the Job Protection Agreement (JPA), under which the FAL-CAL seniority integration was conducted, was signed. In November 1986, Continental hired the former Frontier pilots and merged CAL-FAL flight operations after Texas Air, through NYA, took delivery of Frontier's 44 aircraft and airport properties.

Between October 1986 and January 1987, the PEX pilots formed a research committee to prepare for their seniority integration arbitration with CAL pilots. The committee held its first meeting in December 1986. It retained counsel in early 1987.

A CAL-NYA seniority integration award was issued by Arbitrator Richard I. Bloch on December 18, 1986. It was implemented on January 27, 1987 for System Bid 87-1 which was open to CAL and NYA pilots, but not to PEX and FAL pilots.

The CAL-FAL seniority integration arbitration was held in early 1987, and following the submission of post-hearing briefs, the award issue on June 15, 1987.

On February 1, 1987, the Company began marketing CAL, PEX and NYA as a single integrated airline. The management of People Express operations, marketing and administration functions was assumed by Continental.

Between January and March 1987, Continental and the PEX Committee unsuccessfully attempted to reach agreement on a seniority integration procedure. On March 10, 1987,

the Company informed the PEX Committee that it would unilaterally created a seniority list containing the CAL and PEX pilots to be used in the event the operations were

merged. The list was announced on March 12, 1987.

On July 10, 1987, the Company issued another seniority list which included the FAL pilots. System Bids 87-2 A and B – an alternative arrangement with one option providing for PEX pilot participation in the event CAL and PEX operations were merged – were never implemented.

On October 23, 1987, System Bid 87-3 was issued. For the first time, a system bid was open to all CAL pilots (including former FAL and NYA pilots) and former PEX pilots. The bid was awarded on December 11, 1987 and effective on July 1, 1988, when all CAL and PEX pilots first were fully staffed together.

PEX's Financial Condition

In April 1986, People Express had begun to implement portions of a new marketing strategy in an effort to stem heavy first quarter 1986 losses. In June 1986, PEX announced that it was downsizing its operations due to an excess of capacity, and all or part of the airline was for sale. Although its boarding rate exceeded 2.1 million passengers in August 1986 (30.7 percent more than August 1985 and a new monthly record), the company's heavy losses continued in the second quarter. PEX's net loss for the first six months of 1986 was nearly $80 million. The

Company incurred modest net losses in July and August 1986.

A preliminary business plan for PEX, dated August 7, 1986, states that although "PEX's cost structure is a very powerful competitive advantage, . . . given the revenue driven nature of the airline business, [PEX] must embark on a strategy to enhance its revenues." In addition to the new marketing strategy aimed at raising revenues, the company negotiated an 18-month lease to Pan Am of eight B-727-200s, which were excess to its current needs, for $8.4

million. It was also considering several possibilities for three of its B-747s, including their sale or lease to another carrier. The business plan projected an increase in operating income of $40.7 million following its full implementation in the second year, after losses during the first and third quarters of the plan's implementation. The plan required a 25 percent reduction in daily departures, a 14 percent reduction in block hours, and a break even load factor (BELF) of 70 percent. In addition, the company's fleet would be reduced from 79 to 69 aircraft (two less B-747s and eight less B-727s) which would undergo extensive modification in order to provide multiclass service. Fifty eight of the 69 aircraft would be in service at any given point in time.

A "preliminary draft" dated "September__, 1986" by Morgan Stanley & Co., Inc., the investment banker retained by the PEX Board of Directors to review the conditions of

the TAC-PEI merger prior to September 15, 1986, states in part: ". . . without the prompt infusion of a significant amount of cash from asset sales or sales of new equity, there is grave doubt that the Company will be able to meet its ongoing financial obligations in the near future." It further states: "Other than as described herein, no financially responsible company as of this date has made a credible proposal for the acquisition of PEI, and no other such proposal appears immediately forthcoming."

The TAC-PEI merger agreement and plan, dated September 15, 1986, required that PEX "shall affirmatively state and use its best efforts to demonstrate orally and in writing that it is a failing company both for purposes of any submission to [the U.S. Department of Transportation] and for purposes of any filing with or notification to any federal antitrust authority . . ..."

During the third quarter of 1986, which ended on September 30, two weeks after the merger announcement,

PEX recorded an operating loss of nearly $24 million and a net loss of $40 million. The company's losses for the first nine months of 1986 were $120 million. On September 30, 1986, People Express had a working capital deficit of $147.8 million, as compared to $10.7 million on December 31, 1985. Its debt service requirements as of September 30, 1986 were $34.5 million through December 31, 1986, of which $15.6 million had been paid through November 14, 1986. An Internal Revenue Service assessment of $11.5

million against the company also was outstanding.

On October 15, 1986, the U.S. Department of Transportation (DOT) issued a Show Cause Order concerning the acquisition of PEX by TAC. Although the DOT declined to render findings as to whether PEX was a failing company because, it noted, such a determination was relevant only if it had found the acquisition to be anticompetitive, the order observed: " . . . the applicants themselves have made public facts suggesting that [PEX] will not survive without the acquisition. People Express' financial difficulties have become widely-known as a result." The order further stated: ". . . the imposition of LPPs is likely to cause Texas Air's withdrawal from the transaction and thus the bankruptcy of People Express."

The DOT's Final Order in the above transaction, dated October 24, 1986, noted:

> . . . The record amply demonstrates that prompt approval of the acquisition is necessary for [PEX's] survival. People Express in fact would have run out of cash already but for the financial assistance provided by Texas Air under the merger agreement, and that agreement does not require Texas Air to provide any additional assistance after this month. Without the last payment by Texas Air at the end of this month, People Express would have little or no cash left,

> and it appears unable to obtain cash from any other source. App. October 9, 1986 letter at 3. Its cash shortfall from operations appears to exceed $500,000 each day, a rate of losses which will rapidly exhaust the last cash advance due from Texas Air.

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The order also stated: " . . . Given People Express' critical financial condition, it is unlikely that the carrier could continue to operate at its present scale if it remained independent."

The minutes of a special PEX board of directors meeting on September 14, 1986, state in part:

> At this point in the meeting, Mr. Burr asked Mr. Norris to review with the Board the Company's current cash position and projected cash flows through the end of the year. Mr. de Leeuw then reviewed with the Board the status of the Company's accounts payable. Mr. de Leeuw stated that there could be no assurance that vendors or other creditors of the Company would continue indefinitely to allow the Company to extend payment periods. Messrs. Norris and de Leeuw reported to the Board that they had developed day-to-day and week-to-week cash flow forecasts based upon anticipated revenues, scheduled lease and debt payments and anticipated operating expenditures. Messrs. Norris and de Leeuw reported that, without the prompt substantial infusion of a significant amount of cash, management's projections indicated that the Company would be in a negative cash position by mid-October. Mr. Norris and Mr. de Leeuw reviewed the status of the Company's ongoing efforts to raise cash by

disposing of aircraft. Messrs. Norris and de Leeuw reported to the Board that it did not appear that a partial liquidation of the Company's aircraft and other assets represented an alternative method of both resolving the Company's cash flow deficit and placing its operations on a profitable basis. The fact that the Company's aircraft were already heavily financed and had little remaining equity value and that the market for used aircraft, particularly Boeing 747's, was very weak made it very remote that the Company could raise enough to continue operations as an independent entity even under the protection of Chapter 11 of the Bankruptcy Code. The Board also considered the revenue impact that might result from a public admission of the Company's status as a failing company. Mr. Fiedorek then reported to the Board that the

cash flow forecasts presented by Messrs. Norris and de Leeuw were corroborated by month-to-month cash flow projections which had been developed by Morgan Stanley. Mr. Fiedorek also reported that representatives of the Palmieri Company ("TPC") had concluded, on a preliminary basis, that management's cash flow analysis was essentially correct.

* * *

Mr. Norris then reviewed the Company's projected cash flows in the context of a bankruptcy proceeding. Mr. Norris reported that management had concluded that, in a bankruptcy proceeding, the Company might be

able to have a modest positive cash position at year end, but that such analysis did not consider any negative impact on revenues resulting from a bankruptcy filing. It was noted that the Company's cash position was so critical that any adverse revenue impact of a bankruptcy proceeding would have a material adverse effect on the Company's cash position and its viability. It was the conclusion of management that a bankruptcy liquidation would result in only a 50% realization for unsecured creditors and no residual equity for the holders of the Company's Common Stock and Class B Common Stock. In addition, it was management's view that the Company did not have a realistic possibility of reorganizing in bankruptcy for various reasons, including the uncertainty as to the ability of People Express Airlines to retain the rights to Terminal C in the event of a bankruptcy.

The record also contains a document dated September 17, 1986 and titled, Transcript of Discussion with People Express Board of Directors. The discussion reflects that a financial consulting firm, The Palmieri Company, was commissioned by PEX to undertake an intensive review of the company's financial position. The group, which was composed of experienced consultants, spent two and a half days examining: (1) the company's "status quo cash flow"; (2) the underlying assumptions in the company's forecasts; (3) adjustment in

the forecasts for the effects of a bankruptcy proceeding; (4) other potential cash sources and risk issues, and potential responses to routing and fleet deployment and pricing and labor issues; and (5) whether the company could hope to

exist as a viable business. The group found that "the cash flow could not be more critical" and the "near term cash crises . . . leaves very little room to maneuver outside of a [bankruptcy] proceeding or outside of a sale such as the one that has been negotiated." The group further found that "it would be difficult to find anyone who . . . would be willing to testify to a judge that there was over the period of six months to a year an opportunity to make a business out of this airline." The group concluded: Therefore, we think that it is more than likely based on the observations of our study, that a Chapter 11 proceeding does not present an alternative to the company and would likely lead to a liquidation in a relatively short period of time."

The record is unclear concerning PEX's assets at the time of the merger. A letter of October 9, 1986 from counsel for TAC and PEX to a DOT official stated:

> People Express also has no unencumbered assets that have any significant equity that would provide an opportunity for raising additional capital. The majority of People Express' aircraft fleet (53 aircraft) are covered under publicly-held secured equipment trust certificates the trust indenture which contains a provision which prohibits People Express

> from creating any additional liens on those secured aircraft. The remaining 26 aircraft are covered under capitalized leases or operating leases which would provide no financing opportunities since People Express does not own the assets.

The record also reflects that the company held about $60 million in spare parts, $35 million in slots and gates, an undetermined amount of collateralized equity in its aircraft

and international routes, including Newark to London.

On September 15 and October 3, 1986, TAC respectively infused $10 million and $20 million into PEX. By December 18, 1986 TAC had provided PEX $107 million through 11 separate cash infusions. PEX's net loss for 1986 was $198.5 million. (200 million from Eastern)

Compensation Comparisons

This section reviews the major items in the compensation packages at People Express and Continental in September 1986.

PEX employees received 100 percent paid medical and dental insurance through a self insured company plan. Disability insurance was fully paid for the first six months of incapacitation, with 50 percent of base salary up to $3,000 per month thereafter, also through a self insured company plan. Stock ownership in the company was available at significantly discounted prices. Employees also participated in the Ownership Income Plan based on the number of shares they held. After 1984, the profit sharing plan

for pilots changed to a return on revenue plan. Although the company did not offer a retirement plan, employees could participate in a 401(k) stock purchase plan. A $50,000 death benefit policy for each pilot was provided by the company. Vacation was accrued at the rate of 14 days per year on completion of one year of employment. Employees received unlimited paid sick leave days and seven paid holidays each year. They also received credit for training days. The company's unwritten no-furlough policy was to provide employees with a "job for life." Employees received unlimited flight pass privileges.

Continental's medical and dental plans contained deductibles and provisions for co-insurance. The Company today offers employees the opportunity to enroll in a dental

plan with no deductible. Although no paid disability insurance was offered in 1986, the Company today pays one-half of the cost for this item, and it offers a long term disability plan. In 1988, Continental established a retirement plan which is a 100 percent company funded, defined benefit plan. It also offers a 401(k) plan and matches 25 percent of an employee's contribution up to three percent of salary. In addition, the Company provides a flex-benefit program which entitles employees to contribute up to two percent of salary to purchase certain benefits and up to another two percent of salary in lieu of one week of vacation. The life insurance benefit is equivalent to a pilot's annual base salary. The profit sharing

plan provides for payment to employees for the years in which the Company realizes a net profit. Continental, at the time of the merger, provided for pilots to accrue sick leave on a monthly basis. Today, the Company provides up to five months of paid sick leave. Vacation is accrued at the rate of seven days per year after one year of service. There are no paid holidays, and no credit is given for training days. After six months of service, an employee has unlimited flight passes.

The PEX salary structure for pilots after four years of service, effective August 1, 1985, was as follows: Captain/Team Manager - $75,500; Captain - $68,300; First Officer/Team Manager - $60,500; First Officer/Team Leader $54,500; First Officer - $48,500; and Second Officer - $48,500. Captain's pay for new hires through four years of service successively was: $42,000, $48,000, $53,800 and $60,500 (with overrides for team manager duties ranging from $4,000 in the second year to $7,200 in the fifth year of service). First officers' pay ranged from $22,000 for a new hire to $41,800 for four years of service (with $12,000 overrides for team managers and $6,000 overrides for team leaders). Second officers' pay ranged from $12,000 for a

new hire to $41,800 for four years of service (with the same $12,000 and $6,000 overrides paid to first officers in leadership positions). An incentive program based on the sharing of revenues from in-flight commissary sales, with the potential for a $6,000 average

annual incentive payout, was implemented in 1986. A question remains regarding whether a $12,000 pay cut was effective in November 1986, or prior, for captains not working in a support function.

Continental salaries for captains ranged from $48,750 for the first four years of service to $50,000 for five to ten years of service, and amounts ranging from $52,500 $64,000 for from ten to 30 or more years of service. First officer pay for a new hire increased from $15,000 to $24,000 after six months and from $33,000 in the second year incrementally to a maximum of $40,000 in the sixth year of service. Second officers were paid the same rates as first officers during the first year and earned from $29,000 in the second year to a maximum of $35,000 in the sixth year. In addition to these salary scales, all pilots were paid a portion of the savings realized from fuel efficient flying practices which amounted to 27 percent of their pay. Over 90 percent of all pilots received a training incentive of $3,000, paid to all employees who do not change equipment on a bid. Pilots also received additional pay for flying in excess of the 83 hour per month guarantee.

PEX Facilities

PEX's facilities may be divided into three components: (1) Terminal C at Newark International Airport; (2) other structures in and around Newark International Airport and (3) outstations and slots.

Newark International experienced phenomenal growth in the 1980s. It now handles about 40 percent of the total revenue passenger traffic in the three major airports serving the greater New York City area. Seventeen million people reside within 50 miles of Newark International. An expansion of the airport's capacity is estimated to double its passenger traffic to 50 million by the year 2000.

In 1984, People Express and the Port Authority agreed to reconstruct Terminal C which had been built in 1971. On January 11, 1985, the parties entered into a contract for the construction and lease of the facility. PEX received the rights to 41 gates; Eastern, nine gates; U.S. Air, seven; NYA, five, and Delta, four. The International facility in Terminal C was not restricted to PEX use. Although PEX contributed no money toward the construction of Terminal C, it worked on the design and construction schedule of the 860,000 square foot facility. The Port Authority agreed to fund the construction project up to a cost of $150 million, and up to $175 million on subsequent approval. The opening date of the facility, which originally was scheduled for February 1986, was extended to the summer of 1987 due to construction delays. The Port Authority took control of the construction project from PEX. In September 1986, the construction schedule was more than 50 percent completed, with the foundations laid, major structural steel in place, exterior skin

affixed, ramps largely finished and some interior mechanical work accomplished. PEX's rental payments on Terminal C were to commence on January 1, 1987. PEX's 25 year lease was converted to a month-to-month tenancy on September 30, 1986, when it failed to meet certain financial conditions under the agreement with the Port Authority. On August 15, 1987, with the Port Authority's consent, PEX assigned its rights under the lease to Texas Air. The Port Authority and Texas Air reached agreement on a new 25-year lease, an

increase to $225 million of Port Authority funding and a reduction in the rental to be paid by Texas Air. When Continental assumed control of the construction project, it was 84 percent complete at a cost of $165 million. Continental undertook extensive redesign of the facility which opened on May 22, 1988. Construction work on Terminal C continued into 1990. From August 15, 1987, when $152 million had been spent on the facility, the Port Authority has funded increases to a total cost of $232 million. Continental ultimately will reimburse the Port Authority through rental payments. Continental additionally has contributed $56 million to the project. The total cost of Terminal C as of April 1990 was $291 million.

PEX released several other facilities in and around Newark International, including the North Terminal which housed 23 PEX gates, the North Terminal Annex, the hangar 55 complex and the cargo building which houses other tenants. Offsite facilities included the Haynes Avenue

building, the International Plaza building and a simulator facility 30 miles from Newark International in Totowa, New Jersey. Continental assumed the leases on all of these properties.

PEX held leases on more than two dozen outstations at various airports which included terminal space, landing rights, gates and slots. It also owned or leased a variety of ground equipment at these stations. PEX held 200 slots at high density controlled airports, most of which were commuter slots.

Flight Manager Representatives

In 1984, PEX began investigating other sources for the recruitment of pilots. The approach selected in November 1985 involved the hiring of pilots who could qualify with a minimum number of flight hours, and who would be trained

"from the ground up" using simulators for instruction as opposed to aircraft. Candidates for this Flight Manager Representative (FMR) program were selected from young aggressive recent aviation school graduates who would require a longer period to upgrade from second officer through first officer to captain positions. These candidates were ranked in the top third of their class with a minimum 3.0 grade point average, and a recommendation from the dean of their school. They held a commercial instrument multi-engine rating and had completed the flight engineer dispatcher written examinations.

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The first employees to qualify for the program were ten in-house PEX employees who met the majority of these qualifications. In August 1985, they were placed in a Flight Manager Development (FMD) program developed by the company. The program was flexible, and it was changed as the company itself was changing in 1985. Additional new hires for the same program, known as FMRs, were recruited with the aim of quickly attaining captain positions. They were generally about 35 years old. Recruiting efforts for succeeding FMR classes focused on younger people in an effort to avoid future problems arising out of mass retirements. These FMRs were brought on board in a type of probationary status in a training program from which they would graduate as second officers qualified on the B-727. Following the requisite simulator training, they would become first officers. After PEX acquired Britt, FMRs were trained on commuter aircraft. The time frames for FMR progression to the first officer position are in dispute between the parties. The starting salary for FMRs was $12,000, and they were eligible for the incentive program with a potential payout of $6,000.

PEX hired approximately 180 FMRs and immediately placed them on the pilot seniority list. Approximately 30 resigned before completing the program. Of those 30, 17

were hired by other airlines. Twenty nine FMRs who had over 1,500 flight hours attempted, and all successfully completed, an optional "up or out" program at

Continental under which they became qualified as first officers prior to completing the Company's training schedule at its commuter operation for the remaining FMRs. Of the remaining FMRs at Continental in June 1990, 112 were qualified to fly as first officers and the balance were second officers.

Fleets

On September 30, 1986, CAL operated 149 aircraft with 116 on order or option (58 on order and an additional 58 on option.* CAL's fleet consisted of: 50-B-727-200s, 24 B-737-300s, 16 DC-9-30s, 14 B-727-100s, 14 DC-9-80s, 11 DC-9-10s, eight DC-10-10s, six DC-10-30s and six A-300s. Between September 4 and 15, 1986, PEX had leased seven B-727s to Pan Am (and an additional B-727 on October 1, 1986) for use on its shuttle. Moreover, under the September 15, 1986 merger agreement, PEX had agreed to lease back from NYA six B-727-200s which ultimately passed to CAL through NYA. The record reflects that both PEX and CAL pilots flew these aircraft in December 1986.

By December 31, 1986, CAL was operating 244 aircraft with 104 on order or option. On December 30, 1986, PEX had taken delivery of an additional B-747

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* Arbitrator Nicolau had identified 104 CAL aircraft on order or option as of September 12, 1986. The difference between 112 and 104, 12 B-727s, was placed on option from PEX to TAC pursuant to the September 15, 1986 merger agreement in return for the cash payments of $49.5 million to PEX.

which was paid for by TAC and flown by both PEX and CAL pilots in 1987.

In a March 12, 1987 announcement to pilots, CAL management stated that PEX pilots would receive credit for 66 aircraft – 22 B-737s, 36 B-727s and eight B-747s (one of which was paid for by TAC and did not fly for PEX in 1986).

On September 15, 1986, FAL's fleet contained 25 B-737-200s and 16 DC-9-80s, for a total of 41 two-pilot narrow-body aircraft.

On September 15, 1986, NYA's fleet contained eight B-737-300s, 20 DC-9-30s and six DC-9-80s, totaling 34 two-pilot narrow body aircraft.

The Company's Staffing Analysis

The Company's staffing determination for PEX pilots is based on its analysis, in late February or early March 1987, of PEX operations using Continental's pilot utilization. The monthly block hours assigned to PEX operated aircraft were: 11,408 for the B-727s, 5,332 for the B-737s and 1,829 for the B-747s. These figures were based on the maximum number of hours on a daily basis projected in 1987 for the PEX aircraft in operation at Continental. The monthly block hours per pilot used in the staffing analysis was: captains, 64.6; first officers, 64.25 and second officers, 66.52. These figures yielded a total of 289 captains (177 for the B-727s, 83 for the B-737s

and 29 for B-747s). In order to accommodate a PEX management request to include a specific PEX pilot who had performed significant non-revenue flying duties, six additional captains were added to reach the 295 figures. The number of first officers was calculated at 290 (178 for the B-727s, 83 for the B-737s and 29 for the B-747s). The number of second officers was 200 (172 for the B-727s and 28 for

the B-747s). The total number of pilots required under the Company's staffing analysis was 785.

Overview of the Proposed Seniority Lists

The Company

The Company's proposal, as reflected in Bid 87-3, establishes the following seniority list: numbers one through 1,675 were awarded to CAL (including NYA) captains; numbers 1,676 to 2,119 were awarded to FAL and PEX captains by date of hire; numbers 2,120 to 2,418 were awarded to CAL first officers pursuant to the Nicolau Award under which 299 pilots (285 CAL first officers and 15 former NYA pilots) were placed for captain expectancies based on CAL's order and option aircraft; numbers 2,419 to 3,680 were awarded to CAL, FAL and PEX first officers, of which the first 756 pilots (579 CAL and 177 FAL) were integrated by ratio under the Nicolau Award and the remaining FAL and PEX pilots were integrated by date of hire; numbers 3,681 to 3,842 were awarded to the PEX FMRs as second officer positions; numbers below 3,842

were awarded to CAL pilots hired in February 1987 and thereafter.

Under the Company's proposal, as of September 1, 1990,* the pilot seniority list was as follows: numbers one to 1450 were held by CAL pilots; numbers 1451 to 1575 were held by FAL pilots; numbers 1576 to 1794 were held by PEX pilots; numbers 1795 to 2084 were held by CAL pilots; numbers 2085 to 2725 were held in a ratio of CAL and FAL pilots; numbers 2726 to 3019 were held by PEX pilots (except for four numbers held by FAL pilots); numbers 3020 to 3070 were held by FAL pilots; numbers 3071 to 3210 were held by PEX pilots (FMRs). The remaining numbers were held by CAL pilots or reserved for CAL

commuter pilots.

PEX Committee

The PEX Committee's proposal is based on the concept that each pilot group (not including FAL which was not operating on September 15, 1986) is entitled to the jobs it brought to the merged carrier on September 15, 1986. The job entitlements, as viewed by the PEX Committee, are wide-body captain, narrow-body captain, wide-body first officer, narrow-body first officer, wide-body second officer and narrow-body second officer. The PEX Committee

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* This date is used as opposed to, for example, September 1, 1991, because the record does not reflect the effect of the four parties' proposals on a date in 1991.

maintains that it brought 1061 entitlements to the merged carrier.

The PEX Committee's status-ratio proposal, if in effect on September 1, 1990, would have produced the following breakdown of the pilot seniority list: numbers one to 1635 would have been held by 457 PEX pilots in a ratio with CAL pilots; numbers 1636 to 2112 would have been held by 162 PEX pilots (FMRs) integrated with CAL and FAL pilots; numbers 2113 to 2223 would have been held by FAL pilots; numbers 2224 to 2513 would have been held by CAL pilots; numbers 2514 to 3154 would have been a ratio of FAL and CAL pilots; numbers 3155 to 3209 would have been held by FAL pilots; the remaining numbers would have been held by CAL pilots or reserved for CAL commuter pilots.

CAL Committee

The CAL Committee's proposed list is premised on the allocation of 631 positions to PEX pilots on the property on

October 23, 1987, when Bid 87-3 was announced. Based on the list used under that bid, the proposal awards Numbers one to 1660 to CAL (including NYA and FAL) pilots; numbers 1661 to 2018 are a ratio of 230 PEX pilots and 128 CAL (including FAL) pilots; numbers 2019 to 2463 are a ratio of 18 PEX pilots and 427 CAL pilots; numbers 2464 to 2514 are awarded to CAL pilots; numbers 2515 to 3723 are merged in a ratio of 393 PEX to 816 CAL; numbers 3724 to 3769 are awarded to PEX pilots; the 153

FMRs are slotted below those CAL pilots placed on the CAL seniority list prior to February 10, 1988, and they are merged in a ratio with 136 Continental Express pilots.

The CAL Committee's proposal, if in effect on September 1, 1990, would have tracked the Company's list as implemented from numbers one to 1575; numbers 1576 to 1893 would have reflected a ratio of CAL and PEX pilots; numbers 1894 to 2710 would have interspersed 13 PEX pilots with CAL (including FAL) pilots; numbers 2711 to 3623 would have been a ratio of CAL and PEX pilots; numbers 3624 to 3661 would have been held by PEX pilots; numbers 3662 to 3801 would have been held by CAL pilots; numbers 3802 to 4069 would have been a ratio of PEX pilots (FMRs) and Continental Express pilots.

FAL Committee

The FAL Committee's list, if effective on September 15, 1986, would have placed 609 PEX pilots below 557 FAL pilots. These pilots would have been followed by 119 FAL pilots, then 420 PEX pilots (including the FMRs).

This proposal, if in effect on September 1, 1990, would have resulted in: CAL plots holding the first 1450 numbers; FAL pilots holding numbers 1451 to 1575; CAL pilots holding 1576 to 1865: a ratio of FAL and CAL pilots from 1866 to 2506; PEX pilots from 2507 to 2877 (except for

2862 held by a FAL pilot); 2878 to 2931 held

by FAL pilots; 2932 to 3070 held by PEX pilots; 3071 to 3115 held by CAL pilots; and FMRs interspersed with CAL pilots from 3116 to 3941.

Positions of the Parties

PEX Committee

The PEX Committee's proposal is premised on the facts that in September 1986, the three carriers – CAL, NYA, and FAL, which compromise the list into which PEX pilots will be integrated – paid and staffed as captains 940 pilots (102 on international wide-body aircraft and 838 on other aircraft) while PEX paid and staffed 457 captains (52 on B-747s and 405 on narrow-bodies). Based on the combined total of 154 wide-body captaincies, the list should be merged so that the top 154 names include the 52 PEX pilots and the 102 most senior pilots on the CAL-NYA-FAL list, regardless of the carrier of ancestry of those 102 pilots. A date of hire list which included the PEX pilots would fail to deliver to PEX pilots the 52 wide-body captaincies and the 405 narrow-body captaincies they brought to the merger. Therefore, a status ratio is used to preserve the jobs and relative bidding power on each of the two lists, with the 52 PEX and 104 CAL wide-body captains comprising the most senior positions on the list. The next 1,243 most senior places combine the 405 PEX and 838 CAL other captain entitlement holders in an arithmetical ratio. This will preserve the precise access to

wide-body flying each pilot in this group had before the merger and distribute ratably as between the CAL and PEX

pilots the opportunities for bidding and other benefit selections based on seniority.

Continental decided not to buck the 1985-87 consolidation trend in the industry to achieve nationwide route systems and "critical mass." Texas Air gained a "turn-key" expansion into the dense New York City travel market which PEX already dominated through its Newark hub. It also gained the Newark-London and other PEX international routes, Terminal C, PEX's standardized fleet and the 1,061 pilots already trained on the aircraft in the fleet.

This was a merger of equals. While PEX had experienced some financial problems in the year preceding the merger announcement, it recorded net profits in three of the four years of its independent operations after its start-up year. Its operations were profitable on a net and operating basis in the second and third quarters of 1985, and it earned net and operating profits of $5 million and $11 million, respectively, in August 1986, the month before the merger announcement. Cash was stable from August 25 to September 15, at $13.3 million. The reality is that PEX never ceased operating and never filed for Chapter 11 protection.

Predicting the future course of any airline in the turmoil of this volatile industry is a very difficult

undertaking. The record reflects that PEX would have pursued two realistic alternatives other than liquidation if the TAC merger would not have been consummated. One was a merger with America West. The other was a "turnaround" plan. On the other hand, in predicting Continental's future without PEX, there are questions as to how it would have fared without the Newark hub, the PEX fleet and the dedicated PEX employees.

There is no seniority integration arbitration decision which discounts what the pilots from a carrier should receive in terms of a fair and equitable award on account of their

carrier's poor financial performance. Any such decision in this case would have no factual support in the record, no case precedent and no basis in logic or fairness.

The Company's claim that the imposed list must be fair because all four pilot groups oppose it certainly is no test of fairness. In fact, the other three pilot groups were pleased with the list after the PEX operation brought enhanced job opportunities and job security for them through, for example, the B-747s to which CAL pilots quickly gained access on former PEX routes. The 288 PEX pilots inserted at numbers 1678 to 1966 had no chance to fly the regular captain positions in Continental's other domiciles at Houston, Los Angeles, Denver or Honolulu. And not one of the PEX pilots other than these 288 is ahead of any CAL or NYA pilot hired before February 23,

1987.

On September 15, 1986, TAC promised the PEX pilots that the PEX and CAL seniority lists would be merged in a "fair and equitable" way. The promised seniority integration arbitration took place only after the PEX pilots commenced litigation, and the arbitration started three and one-half years after the promise.

TAC's control of PEX effective September 15, 1986 enabled it to renegotiate the purchase price for PEX. The September 15, 1986 Agreement and Plan of Merger gave TAC effective control of PEX. The lock-up provision of the merger Agreement itself prohibited PEX from soliciting other offers and required PEX to portray itself as a failing carrier. PEX's alternatives were, therefore, limited by the merger Agreement. Upon announcement of the merger on September 15, 1986, TAC took immediate control of PEX and utilized its assets to benefit TAC's other interests. In October 1986, TAC adopted a schedule for consolidation of operations at the outstations and immediately began consolidating those operations. TAC was also able to

eliminate competition by discontinuing PEX service to cities where PEX and Eastern competed. Continental also sent its representatives to meet with the Port Authority regarding Terminal C in July and October 1986, and on ten to 15 occasions between October 1986 and February 1987.

There can be no doubt that the operational changes

reflected an intent by TAC in the fall of 1986 to merge its airline subsidiaries as soon as possible. In October 1986 Continental announced that TAC would fold NYA, PEX and FAL into Continental. Steps were also taken to implement a merger of operations as soon as possible. TAC received certificates in the names of PEX and CAL to serve PEX routes from Newark to London and from the United States to Brussels, Luxembourg, The Netherlands, Shannon, Switzerland and West Germany. TAC also received the PEX exemption to serve Montreal from Newark. Effective November 15, 1986, TAC integrated the PEX Frequent Flyer program into the Eastern, CAL and NYA programs. In short, senior management at Continental was making preparations for the merger of operations with PEX almost immediately after September 15, 1986.

Every pilot seniority integration in the airline industry, except two, has been conducted under the fair and equitable standard. The two exceptions were NYA-CAL and FAL-CAL. This arbitration is the only arbitration at Texas Air conducted under the fair and equitable standard since the 1983 strike. During our/these bankruptcy proceedings.

In January and February 1987 the PEX pilots were being assured by PEX management representatives that TAC and CAL management were saying that the merger process was to be a "traditional" arbitration. In March 1987, a CAL management representative handed the PEX Committee the memorandum describing the imposed list.

The PEX Committee was not consulted about the imposed list. All but one of the people who determined how the imposed list would go together have numbers on the CAL pilot seniority list. The CAL Pilot Operations Group was given the opportunity to have input into the imposed list.

The FAL pilots were integrated under a JPA which, as Arbitrator Nicolau commented, did not provide a "level playing field" with "a considerable and obvious tilt in favor of the CO [CAL] pilots." Nicolau refused to include the PEX pilots despite attempts by the Company and the CAL pilots to do so in the PEX pilots' absence.

Continental should not now be permitted to take advantage of its strategy of delay in denying the PEX pilots an arbitration by urging that the imposed list should remain in effect because it will be a nuisance or an expense to change now.

As Arbitrator Bloch observed in the CAL-NYA decision: "There can be no question . . . that, both legally and by any other reasonable measure, [Continental] had started anew in 1983." Continental and Frontier had comparable hiring cycles, both in the percentage and number of pilots that they hired. People Express and New York Air also had very similar hiring patterns as start up carriers in the early 1980s with rapid advancement in the industry. CAL is similar, however, in that its hiring pattern peaked during the 1983-85 time frame which

also was the period of the bankruptcy and strike at Continental.

The industry-wide pilot preference for wide-body flying and the PEX contribution to the merged carrier of its London route, its B-747 fleet and its other vital assets are factors which strongly support the choice of a status-and-category ratio method of seniority integration. In the 1983 TI-CAL pilot integration arbitration, the 66 senior CAL pilots were placed at the top of the merged list because they

were international wide-body captains and because TI did not fly any international wide-body aircraft at the time of the merger. Pilot preference for wide-body aircraft pervades the industry for reasons including improved working conditions and higher pay, status or prestige and a "mystique factor". This preference also occurs at Continental, as confirmed by the CAL seniority list of June 1, 1989, on which 30 of the top 35 captains are staffed on wide-body equipment.

The fact that PEX contributed all eight B-747s to the merger makes doubly inequitable the Continental imposed seniority list which denies B-747 flying to PEX pilots accustomed to the acknowledged prestige and other benefits associated with B-747 flying. Conversely, CAL pilots achieved windfall gains and unfairly profited at the expense of PEX pilots. Seven of these B-747s which PEX operated in September 1986 comprise one-third of the wide-body aircraft then flown by the four merging carriers,

and produce 90 percent of the seats and 85 percent of the total capacity of the 14 DC-10s which Continental operated on September 15, 1986. The eight B-747s, together with existing PEX routes and its Newark hub, enabled Continental to expand into profitable markets which otherwise would have been unavailable to the Company.

In addition to the PEX fleet, Continental assessed the spare parts in the PEX inventory at more than $60 million.

A major contribution that People Express brought to the merged carrier was its Newark hub facility together with the market presence and power that PEX had built up at Newark. Terminal C, as planned and engineered by PEX, was a major asset in and of itself in promoting Continental's public image. Scandinavian Airlines System (SAS) joined with Continental because the SAS hub in Newark dovetailed so well with the extraordinary Terminal C facility. Continental also gained lease rights to significant hangar and storage space at Newark, sufficient ground equipment to

service the extensive fleet at PEX's hubs and out-stations, valuable take-off and landing rights at various slot-restricted airports, and gate space at London's Gatwick Airport.

A carrier's abilities to generate traffic, keep costs low enough to permit effective competition, and maintain a dominant hub to protect or expand its market share were critical to survival and growth in the

deregulated era for new entrants and established carriers alike. PEX was the only one of the four carriers to experience substantial, uninterrupted growth over the full five year period ending September 30, 1986, whether that growth is measured in terms of traffic, capacity or block hours flown by pilots. In five years, PEX reached a level of operations that permitted the DOT to place it in the category which the government defines as a "major carrier" – a level never approached by Frontier or New York Air. PEX produced an operating profit in four of its five years beginning with the fourth quarter of 1981 and ending with the third quarter of 1986. CAL and NYA produced operating profits in three of the five years, while FAL posted an operating profit in only one of the five years. Moreover, PEX showed a positive spread between its actual load factor and BELF in four of the five full years of its operations – the best performance among the four carriers. In sum, PEX was better able than the other three carriers to generate traffic and keep costs low enough to permit effective price competition during this five year period. PEX achieved this operational success largely in the context of stable finances, as indicated by its relatively low debt-to-equity ratio. While PEX may not have had the financial strength of some carriers in the industry, it was not as highly leveraged as Continental. Additionally, PEX brought crew costs to the merged carrier that were substantially lower than the industry average as a proportion

of transportation revenues, due to PEX's relatively greater efficiency and productivity. Similarly, aircraft utilization was also higher at PEX than at CAL or NYA. Finally, the importance of a dominant position at Newark, and by implication, in the New York market cannot be overstated in helping Continental to serve eastern markets in order to achieve sufficient mass to survive both in the national and international markets. International route authority was crucial for the near term future with respect to Atlantic markets, as well as having the ability to enter into cooperative marketing agreements with European carriers. It is true that PEX had problems in the year ending September 30, 1986, but that period coincides with its ill-fated acquisition of Frontier. The PEX-CAL merger relieved the PEX system of the burden of hemorrhaging attributable to the FAL operation and, at the same time, relieved Continental of a low-price competitor at its Denver hub. Claims that PEX was poised for imminent demise and that the valuable assets brought by PEX to this merger would have just disappeared are not plausible in light of airline industry history. Generalizing about a carrier's long term prospects from the financial situation faced by that carrier over a period of months ignores the basic strengths of the carrier built over a period of years. PEX did not have problems that were different from the other three carriers and, indeed, showed characteristics and assets in terms of performance over

a long-term, five-year period that were superior to those other three carriers.

When PEX and CAL merged, the PEX employees lost ground in the pay and benefits area as well as under Continental's personnel policies. PEX recognized that its most important asset was its employees, and it revolutionized traditional views of employee relations. The actual earnings of the PEX pilots, which were higher than those of the CAL

pilots prior to their merger, dropped as a result of the merger and the imposed seniority lists. The pay rates and other compensation plans of the PEX pilots were superior to those of the CAL pilots prior to the merger and dropped as a result of the merger. The base rate of PEX fifth year captains was $68,300, which includes the team leader override received by all PEX captains. The base rate for CAL fifth year captains was $50,000. After the merger was announced, PEX pilots took a pay cut to $56,250 in order to bring them closer in pay to the CAL pilots, and to $50,000 in 1987 to conform to the CAL pay rate. PEX fifth year first officer base pay was $48,500, (with a team leader override, $54,500) as compared to $40,000 for their CAL counterparts. Fifth year second officers at PEX had a base pay rate of $48,500 ($54,500 with a team leader override), while the CAL fifth year second officers received $35,000. Entry level pay for new hire pilots at CAL was $15,000 for the first three months, $18,000 for months four through six and $24,000 for months

seven through 12, and PEX paid $12,000 plus incentive pay for the first year. Although PEX pay rates rose consistently from 1983 to the merger, CAL pay rates dropped dramatically since the strike and bankruptcy in 1983, with barely any increase in the ensuing years. Moreover, CAL pay rates are substantially lower than the pay rates at other carriers, and Continental does not differentiate between wide-body and narrow-body pay rates as is common in the industry. PEX also had a variety of income incentive programs, while CAL has a profit sharing plan that is more restrictive than the PEX plan. PEX had a no furlough policy and a no downgrade policy, whereas CAL has had numerous pilot furloughs. PEX provided medical, life and disability insurance benefits that far surpassed those at CAL. THE SLIC bidding system enabled PEX pilots to prioritize their desires for the upcoming month through the use of a

computer syntax by which the lines of flying were build. A Custom Bidding feature permitted a pilot to work with a scheduler to build the best schedule based on the pilot's desires. On the other hand, CAL pilots bid for preconstructed lines, and improving one's schedule is based on a first come, first served basis through the "open window" period. Continental has unilaterally changed the work rules regarding seniority when it suited the Company to do so. The vacation, holiday and sick leave benefits at PEX were far superior to those benefits at PEX were far superior to those benefits at Continental. There was a unique relationship

relationship between PEX management and employees which resulted in cooperative labor management relations in a high quality work environment with significant opportunities for self-actualization – none of which were present at Continental.

On September 15, 1986, the FMRs were fully qualified pilots who met or exceeded Continental's real hiring requirements for second officers, and thus should be treated just like other second officers for purposes of seniority. At PEX, they were fully qualified commercial pilots with high expectations and excellent career opportunities. Immediately upon their arrival at PEX they were placed on the seniority list and began an intensive training program to prepare them to upgrade to first officer within approximately one year. Twelve FMRs became continental check airmen, several of whom gave line check instruction during the transition to CAL procedures. Others trained and gave final line checks to CAL 1987 and 1988 new hires being staffed as second officers. Continental did not distinguish the FMRs when it proposed to the Federal Aviation Administration reduced training for the PEX pilots for the changeover to CAL procedures. FMRs flew as second officers on the Continental side in January 1987 when they were needed to

staff the PEX B-747s and B-727s that TAC had given to Continental and which were being bid for the flown by the CAL pilots. Nonetheless, CAL management appended the FMRs to the bottom of the

seniority list and forced them to fly in a commuter operation before upgrading to first officer. The FMRs as a group were placed in a less senior position than an entire group of, at best, equally qualified CAL and FAL first and second officers hired prior to the merger. Because the CAL pilots hired after April 1987 were hired for the benefit of Eastern and not Continental, it would be unfair to place them ahead of the FMRs. Aside from the constructive notice these CAL new hires had in 1987, these pilots remain at Continental solely due t attrition and voluntary leaves. No arbitrator has ever looked behind an airline's hiring to assess the qualifications involved in merging pilot seniority lists.

A comparison of staffing at PEX and CAL on September 15, 1986 shows that the two airlines were staffed at virtually identical levels for their relative size. During the planning process, PEX used ratios to calculate flight hour utilization rates for line pilot staffing levels, with management flight crew members added separately. While People Express staffing levels reflected policies and characteristics specific to PEX, the resulting measurements were almost identical to CAL's. At CAL, the pilot system bids and the Pilot Employment Policy (PEP) Manual reflect an average ratio of flight crewmembers per aircraft of 5.27 to 5.29 counting all pilots. CAL's block hour utilization rate is indicated in several documents to be 64 flight hours per line flight crewmember.

In creating the imposed list, which credits PEX with 288 captaincies and FAL with 1677, the Company failed to

consider this parity of staffing between PEX and CAL. This resulted insignificant loss to the PEX pilots and a significant gain to the CAL pilots, as can be seen from computing the respective crew ratios of 3.60 and 9.16 (based on 80 PEX and 183 CAL aircraft), and average flight hours per captain at 81.32 for PEX and 27.42 for CAL. A CAL crew ratio of 9.16 would require 605 PEX pilots to fly even the 66 planes Continental allows us. Applying CAL pilots' 27.42 flight hour average to the number of hours flown at PEX in September 1986 (23,421) would require 854 PEX captains. Moreover, CAL's forecast of flight hours to be flown by a portion of the original PEX fleet in 1987 and 1988 reveals that the shortage of PEX captains for this purpose grew from 103 in June 1987 to 191 in September 1988. At PEX, the daily block hours to be flown by each narrow-body aircraft type was utilized to determine monthly block hours, and B-747 staffing used a total number of man days to be worked. A monthly flight crewmembers utilization rate was applied to the monthly block hour value to determine the number of line flight crewmembers, and the number of management flight crewmembers was then added to determine the total staffing required. The CAL methodology uses the forecast flight hours over a given time period and applies a flight crewmember utilization rate to determine the required number of line flight crewmembers. CAL staffs at a level

sufficient to cover the peak flying periods, and the management flight crewmembers are then considered separately. In the specific calculation of the imposed PEX staffing level, none of the 75 PEX Captains utilized in management function by Continental in March 1987 appears to be included. Additionally, the Company did not use its flight crewmember utilization rate in determining the number of PEX captains necessary to operate in the CAL system. Finally, PEX was given credit for only 66 of the 80 aircraft, the Company says, to account for aircraft transferred to NYA

and leased short term to Pan Am. Yet PEX captains flew some of these aircraft after their supposed transfer to NYA, and it appears that the leased aircraft were returned to Continental after a further extension of the leases. In the same way, the Company distorted the block hours projected for PEX pilots by using a 1987 timeframe which is not justified. Based on these considerations, and in the interest of fairness, the Company should have used the ratio method and the actual number of flight crewmembers paid and staffed at PEX and CAL (1061 PEX pilots and 2175 CAL pilots), with no need for any recalculation of the required or projected staffing levels.

Based on the foregoing considerations and analysis, the PEX Committee contends that its status and category proposal is fair and equitable because it preserves the relative positions of the pilots from each

group and avoids any windfalls to one pilot group at the expense of the other. The six categories in its proposal are: wide-body captain, narrow-body captain, wide-body first officer, narrow-body first officer, wide-body second officer and narrow-body second officer. Places on the merged list are given out to pilots from the two unmerged lists on an entitlement basis. That is, each pilot is assumed to bid the best job he can hold, in accordance with the established job rankings, and the array of names on the consolidated list derives from the principle that each pilot's unmerged relative percentile in his unmerged job will be preserved, as closely as is mathematically achievable, when the two unmerged lists are combined. Under the proposal, each pilot group can take advantage of its own attrition. The number of jobs used to create the ratios for the merged list are based on the jobs that existed before the merger announcement, as opposed to a prediction or projection of the future. The proposal is fair because it preserves each group's pre-merger access to preferred wide-body flying. A date of hire based integration

is unfair and inequitable to the PEX pilots who would be barred from access to the very aircraft they brought to the combined carrier, thus permitting the CAL pilots to reap windfall gains at the expense of the PEX pilots. Given the disparate origins and histories of PEX and CAL – one, a deregulation airline; the other, dating back more than 50 years – the more significant fact is

that a new airline began with Texas Air's acquisition of PEX, and its merger of PEX, CAL, NYA and FAL. Beginning on February 1, 1987, at the latest, pilots on both lists began accruing tenure and service with a new entity, whose pilot seniority list will be created through these proceedings. By preserving each pilot's relative standing in his status and category, the PEX proposal will distribute bidding power and jobs in precisely the same way the two separate lists did. We reject the other parties' proposals to integrate seniority lists on the basis of unreliable predictions about the economic futures of PEX and CAL absent the merger. It is not only unwise but unfair and inequitable to construct an integrated pilot seniority list based on the uncertainty of speculations about the future of PEX and CAL as unmerged carriers. Arbitral precedent supports the adoption of the status and category ratio list and counsels against the use of unreliable predictions about the unmerged economic prospects of merging carriers.

The constructive notice date for the merged seniority list should be September 15, 1986. All pilots hired after that date should be placed on the integrated lists, in date-of-hire order, below all pre-merger pilots. Because CAL did not hire any pilots between the TAC-PEX acquisition date and February 23, 1987, September 15, 1986 is functionally equivalent for constructive notice purposes to any later date up to February 23, 1987. As

of that date, any pilot applicant knew or should have known that his/her seniority rights would be subject to the superior rights of other pilots already employed by the merging airlines. Arbitrators have uniformly accepted the constructive notice doctrine and have ordinarily determined the merger announcement date as the constructive notice date. In this case, pilot applicants would have been placed on constructive notice through a series of events including: the TAC announcement, on September 15, 1986, of the PEX acquisition and merger with CAL upon consummation of the TAC-PEI merger agreement; the TAC-PEX joint application, filed on September 19, 1986 with the DOT, seeking approval of the acquisition; the DOT's tentative and final approvals respectively on October 14 and 24, 1986; the consolidation of facilities of CAL, NYA and PEX during the fourth quarter of 1986; the diverting of PEX aircraft via NYA to CAL; CAL pilots bidding on B-747s previously flown by PEX pilots; the merging of the PEX frequent flyer program with the CAL program in November 1986; and the PEX shareholder approval of the acquisition on December 29, 1986. After issuance of the March 12, 1987 list, management would have expected the Company's interviewers to advise all job applicants who asked that every pilot hired after February 1, 1987 would be placed below all PEX pilots and FMRs. The contingencies contained in the merger agreement were the normal contingencies and conditions that would take place in any financial transaction

of this size and complexity and which, at most, added time, but not uncertainty, to the final outcome which was resolved on December 29, 1986 by the PEX shareholder approval. An objective pilot applicant at Continental on September 15, 1986, or as late as February 22, 1987, should have reasonably believed that the likely outcome of the TAC-PEI merger agreement would result in the integration of the operations and pilots of PEX and CAL. Therefore, it would

have been unreasonable for an applicant to wait until October 1987 before realizing that his/her seniority rights might well be subject to the superior, pre-existing seniority rights of another pilot group. In this regard, it would be particularly inequitable to elevate the CAL pilots hired after April 1987 as potential strike replacements for Eastern, as they were surplus to Continental's operational needs.

The Company's list is unfair and inequitable. It was not compiled as a result of mutual negotiations and mediation or arbitration. Instead, it was unilaterally created by CAL management – specifically, by four CAL pilots whose names appear on the list – and imposed upon the PEX pilots despite their opposition. The use of such a list created by self-interested decision makers is unfair and denies the PEX pilots their right to due process. Thus, there is an unavoidable inference that CAL's decision-makers were not acting in the interests of PEX pilots. Accordingly, the list should be summarily rejected.

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The Company's list should also be rejected because it was created in breach of the LPA and in violation of the industry standard of a fair and equitable integration procedure. There is absolutely no precedent for the unilateral manner in which Continental constructed the list. The PEX pilots had no meaningful input into its formulation. Continental's reliance on the allegation that PEX would have gone bankrupt and ceased operating but for the merger as a purported justification for its derogation of the PEX pilots' seniority rights is unsupported by the facts for the case precedent. A carrier's financial condition deserves little or no weight when merging pilot seniority lists. Continental desperately needed PEX to survive in the deregulated environment, and the merger of PEX and CAL should be viewed as the joining of equals. Continental cannot show that PEX would have gone into bankruptcy and ceased operating but for the merger, even if it were appropriate for CAL to take into

account its supposedly superior financial condition to PEX, which it is not. Continental has had a planned strategy for delay in this case, and therefore the fact that its unlawful list has been in effect for four years should be given no weight. Indeed, the Company should be stopped from arguing that its imposed list should be upheld on the ground that it has been in use for four years.

The Company's list should also be rejected because it arbitrarily places CAL pilots ahead of PEX pilots with

the same or higher status, seniority and experience, substantially decreases the PEX pilots' relative position and permits CAL pilots to reap windfall gains at the expense of PEX pilots. In compiling the imposed list, the CAL decision-makers focused almost exclusively on the allegedly disparate economic conditions of the two airlines to the exclusion of other relevant factors such as length of service, relative position on the unmerged lists, and status achieved at the pre-merger carriers. Under the imposed lists every PEX pilot loses relative position. Despite the wide-body jobs that PEX pilots brought to the merger, for example, the lists denies any of them from achieving any of their entitlements to the more desirable positions. The Company downgraded approximately 150 PEX captains and placed them junior to all CAL and NYA pilots hired before the merger announcement. In so doing, the Company split the PEX April 25, 1983 training class of pilots, with the anomalous result that one class member (number 300 on the PEX seniority list) is now number 1977, and another (number 301 on the PEX list) is now number 2857 on the integrated lists.

The Company's list also artificially enlarged the CAL captain class and artificially reduced the PEX captain class. The former was increased from 857 pilots actually trained and flying as captain on September 15, 986 to the

top 1677 positions on the imposed list.* The latter was reduced from 457 to 288. According to the PEX Committee's analysis, 1299 captain slots, including management, were awarded based on present and future captaincies on Bid 87-1, effective December 1987. Therefore, since the number one PEX seniority holder does not appear on the merged list until number 1678, at least 378 pilots who did not even hold a future captain bid were placed ahead of him. CAL pilots were allotted 1677 captain positions based in part on the planned delivery of aircraft in 1987, which did not arrive, and the additional transfer of aircraft (five B-747s and six B-727s) from PEX. The reduction of the PEX captain class was accomplished without talking to a single PEX line pilot and was fraught with inaccuracies and inconsistencies – not the least of which were the reliance on, and a misunderstanding of, only one month's statistics, and a misunderstanding of PEX's manning and staffing calculations.

Under the Company's list which resulted in the PEX pilots' loss of relative position, they enjoy few benefits from working for the merged airline – especially with regard to bidding different types of equipment and holding different domiciles.

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* CAL bid 85-5 projected 857 captains at Continental on November 1, 1986. As of September 1986, Continental paid and staffed only 772 captains. According to the Block Award, NYA had 168 captains on that date. Since the PEX merger, however, Continental has needed to promote CAL pilots to fill the downgraded PEX captains' positions.

The Company's list is unsupported by any precedent, including the cases it has cited. In the CAL-FAL pilot case, Arbitrator Nicolau observed that the JPA and its Sideletter imposed restrictions not found in other proceedings, resulting in a considerable and obvious tilt in favor of the

CAL pilots. For example, he was required to take special notice of the non-operating status of Frontier and the limited employment prospects for FAL employees resulting there from; and as a result, give this fact greater weight than the expectation that Continental's competitive position would be enhanced. Even more damaging to the FAL pilots was the requirement to ensure no dilution or adverse impact on the promotional expectations of CAL (including NYA) captains and first officers based on all aircraft in service or on firm order or option to Continental. The CAL-PEX flight attendant case is not a useful precedent because, like the FAL pilots, their arbitrator's mandate required him to consider factors beyond the fair and equitable standard. Moreover, the PEX flight attendants were grouped in a single job description (Customer Service Manager) and were subject to different economic and non-economic benefits from those of the captains, first officers and second officers whose progression in status and careers are more significantly determined by seniority. A third distinction was the PEX practice of cross-utilization whereby 15 to 20 percent of the Customer Service Managers worked in jobs which did

not involve flying. Finally, the CAL-PEX flight attendant hearing lasted only six days, whereas the record of the instant case is far more complete with respect to the financial condition of the two airlines involved in the merger, among many other things, and the many economic benefits brought to the merged carrier by PEX and its employees.

The CAL Committee's proposal is even more unfair and inequitable than the Company's proposal, and therefore should be rejected. The primary factor which the CAL Committee used in constructing its proposal was the contention that PEX as an airline had failed, and that therefore the PEX pilots had no career expectations and were entitled to nothing by way of seniority integration. Although

PEX experienced some financial difficulty during the year preceding the announcement of the TAC merger, the fact is that PEX was a going business at the time of the merger, which, unlike CAL and FAL, never sought Chapter 11 protection. Continental's financial history (and current status) hardly places it in a position to assert that its financial condition was superior to that of PEX. Nor are FAL and NYA pilots entitled to seniority preference over PEX pilots. FAL had already filed for bankruptcy protection at the time of its operational merger with CAL. NYA as well was having serious financial problems at the time its operations were merged into Continental's in early 1987. The CAL Committee's

proposal uses a variety of methodologies, manning levels and different system bids for determining the number of CAL pilots and the number of PEX pilots. System Bid 87-3 (October 1987) was used for determining CAL pilot utilization, but the month of December 1986 (the industry's seasonal low point month) was used for PEX. System Bid 88-1R (a reduction bid) was used to determine the number of PEX pilots eligible for captain positions. The CAL commuter staffing levels were used in determining the FMR placement. Neither date of hire nor length of service nor position achieved was given any significant consideration under the CAL Committee's proposal. It would have been better for a pilot hired by PEX in 1983 to have quit PEX as a captain after the acquisition and then gone to work at Continental in 1987, because he is ranked beneath CAL pilots hired by Continental in March 1987. The CAL Committee's list is totally unfair to the FMRs in view of their hire dates, qualifications or experience, as well as under the constructive notice doctrine.

The FAL Committee's proposal improperly tries to reverse the impact of the CAL-FAL award which was not a product of the PEX pilots' proposal in this case, nor of any

PEX actions. This Arbitration was intended by the Court to be a two-list integration involving CAL and PEX. The FAL pilots' participation is solely as a component of the CAL list. The FAL Committee's proposal imposes inexcusable and irresolvable equities on the PEX pilots who

would lose 1,000 seniority slots and be covered under a useless 'fence" which creates additional inequities and will spawn future arbitrations. The FAL Committee's proposal simply ignores all FMRs under its "date of commitment" method which recognizes FMRs on the date they completed their training, as opposed to the date they entered training.

CAL Committee

The CAL Committee determines that 641 PEX pilots (248 captains, 230 first officers and 163 second officers) were entitled to placement on an integrated list. Its figures are based on the actual block hours flown by PEX in December 1986, as opposed to the Company's approach which used 1987 projected monthly block hours. The CAL Committee also uses the actual CAL pilot utilization rates, as opposed to the Company's use of the PEX monthly utilization rates. It adds a five percent factor for management pilots, which approximates the number at Continental. This reflects the fact that the PEX pilots would be employed under Continental work rules and subject to this management structure.

The CAL Committee premises its list on the date of October 23, 1987 – the date of Bid 87-3 which was the first combined seniority event involving CAL, former FAL and former PEX pilots.

The former PEX pilots are integrated by status to

the extent that 230 of the 248 captains are ratioed with 128 CAL captains in the group of captains immediately below the last former FAL captain. Those 128 CAL pilots had held captaincies as a result of Bid 87-3. The remaining 18 PEX captains are then ratioed with 427 CAL pilots who had held captain seats as a result of Bid 87-3, but lost them in an overall seven percent decrease on reduction Bid 88-1R. The 393 PEX first officers and second officers are ratioed with 816 CAL first officers and second officers – ending with the last pilot Continental hired prior to Bid 87-3. The remaining 51 former PEX pilots employed on October 23, 1987 follow in a block. The FMRs are placed on the merged list, effective February 10, 1988 – 58 weeks after TAC acquired PEX and the earliest time at which the FMRs could achieve full commercial pilot qualification under Continental's training program. They are ratioed with 136 CAL commuter pilots.

Arbitral authority establishes that to be "fair and equitable", the integrated seniority list must recognize and protect the career expectations which each competing group might reasonably have anticipated had the merger not occurred. The application of this common sense principle is not simply a matter of mechanically counting airplanes and pilots. Rather, some assessment must be made of the probability that those airplanes would continue to provide work and promotions for those pilots if no merger

had occurred. While such an assessment cannot be based on an exact science, the evidence in this case is overwhelming and largely uncontroverted that the PEX pilots had virtually no realistic expectation of being able to continue their careers as airline pilots with People Express after December 1986. In other cases, each partner has brought different strengths and different weaknesses, and the resulting combination was likely to be stronger than either of the pre-merger components. Moreover, none of the contending

pilots were saved from unemployment by the merger in question and all had reasonable expectations of continuing their careers.

The proposed seniority list offered by the CAL Committee will afford each of the affected pilot groups the opportunity to realize the career expectations each might reasonably have expected had the merger not occurred.

A fair and equitable list must equitably apportion the opportunities for advancement and the consequences of retrenchment. The CAL Pilot Committee proposal places 230 PEX pilots on the combined list in the top 2,000 positions – within the lower 20 percent of the hard captaincies at Continental. These PEX captains, however, ought not be permitted to outbid any CAL captain whose captaincy predated the award of Bid 87-3 – when the pilot forces were combined. To allow otherwise would constitute a classic windfall to PEX pilots who would never have had an opportunity to claim any of Continental's eight bases

or equipment. Because slightly different considerations apply to those CAL pilots who first attained captaincies on Bid 87-3, they are ratioed with the 230 PEX captains so that career progressions are shared. The corollary premise – sharing of downside risk – underlies the separate ratio of the 18 PEX captains and the CAL captains who were unable to hold their Bid 87-3 captaincies through Bid 88-1R, so that any future reduction in that "fringe captain" area will be borne ratably by CAL and PEX pilots. A similar approach to assure no windfalls is used in the integration of the first and second officers, with all PEX pilots lower than all CAL pilots who had become first officers prior to the award of Bid 87-3, followed by a ratio of PEX and other CAL pilots in first and second officer positions. As of September 1, 1990, every PEX pilot in this last ratio would have had sufficient seniority to hold a first officer position. The final group of PEX airmen includes those individuals who would certainly

have lost their jobs absent the merger. Therefore, these "constructively furloughed" pilots are placed at the bottom of the Continental list in October 1987, at the time of Bid 87-3. This last group includes the FMRs who, even under the People Express plan for them, would have been sent to commuter subsidiaries to accumulate piloting experience prior to becoming first officers. In 1987 and 1988, the FMRs were not qualified, by CAL's standards, to occupy any pilot position on the airline; yet they were given seniority

position which allowed them to accrue competitive pilot seniority, thus producing a clear windfall, while they were gaining experience at CAL commuter lines. For this reason, they are assigned a seniority date of February 10, 1988, which was the earliest date on which any FMR could theoretically have completed the CAL commuter training if, indeed, CAL had begun the program in 1987.

Concerning exposure to retrenchment in an industry where careers are not as stable and secure as they once were, the CAL Committee's proposal places the PEX pilots in far safer positions – with a cushion of more than 1,100 pilots junior to the last hired PEX pilot – than they occupied at PEX prior to the acquisition. The FMRs will senior to nearly 750 CAL pilots.

The principle of "constructive notice" does not prohibit implementation of an otherwise fair and equitable integrated list in this case. The notice underlying this principle is that pilots hired by an airline after that airline has publicly made clear its intention to acquire – and merge with – another airline, ma fairly be charged with notice that their seniority interests may be subject to the seniority claims of the pilots already employed by the to-be-acquired airline. That doctrine, however, does not arise until such time as an objective observer, having access to the publicly-available information a pilot applicant might have, ought reasonably to have concluded that an operational merger of the affected

pilot work forces

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would occur. Throughout most of 1987, the operational merger of PEX and CAL was in doubt. The PEX fleet was "fenced" from the combined CAL/NYA/FAL fleet, and staffed and flown exclusively by PEX pilots until October 1987. At that time, the operational merger became a reasonable certainty. Secondly, the doctrine simply imputes notice of the pendency of a merger, as opposed to establishing the seniority equities of the to-be-acquired pilots as superior to those of the "on-notice" pilots at the acquiring airline. In this case, the PEX pilots had neither secure jobs nor reasonable expectations for career advancement, and nothing in the constructive notice doctrine relieves the Arbitrator from giving those facts determinative weight. Finally, the claim of constructive notice has no applicability to issues raised by the presence of the FMRs who were not pilots at People Express.

The proposal of the PEX Committee fails to satisfy any of the recognized criteria of fairness and equity. The proposal, attrited for currency to September 1, 1990, includes every PEX pilot and all but 33 of the FMRs (hired after June 29, 1986) in the top 2,000 hard captain positions. It bumps out of captain seniority hundreds of CAL pilots who held that status long before People Express was acquired b TAC.

The Company imposed list does not fully satisfy the fair and equitable standard. It credited the PEX pilots with more captains than People Express legitimately

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required in December 1986. The Company's calculation was based on a projection of the flying planned for the former PEX fleet in the summer peak period of 1987. By that time, however, PEX planes and pilots were flying routes they had never flown before, where they replaced flying formerly

done by CAL planes and pilots. Additionally, the Company accommodated a PEX request to protect a PEX pilot in captain seniority, resulting in further inflation of the PEX captain entitlements. The Company also failed to consider the CAL captain reductions required by Bid 88-1R, which did not reach any PEX captain protected by the Company's list. As a result, the CAL pilots absorbed all of the adversity, and the CAL Pilot Committee's proposal attempts to remedy this defect through its ratio method. Finally, the Company's list gives an unwarranted windfall to the FMRs, who were placed in a block senior to hundreds of fully qualified pilots hired by Continental in 1987 and 1988.

The FAL Committee, operating under the constraints imposed by the Court's Order, has made a persuasive case for its proposal, particularly in the way it has structured the relationship between the former FAL and PEX pilots.

FAL Committee

The District Court saw the need for construction of a list that was not only fair to the PEX pilots in relation

to the CAL pilots, but a list that was also fair and equitable to the FAL pilots in relation to the PEX pilots. The FAL Committee is a full party to this proceeding, with the sole caveat that it would be bound by the Nicolau award.

The relevant histories of PEX and FAL and the transactions between themselves and CAL demonstrate the superior equities of the FAL pilots. Since its inception in 1946, FAL had enjoyed a long and profitable history, while PEX was a risky start up operation in 1981 and began a course toward financial oblivion after some brief successes. The FAL pilots hired prior to 1983 believed they were employed by a stable, mature and historically profitable enterprise, while every PEX pilot knew the uncertainty of the airline under deregulation with an unorthodox management

style. The trade off for becoming "instant" captains was the risk inherent in an operation with no history of profitability. The FAL pilots absorbed a series of wage reductions and working condition modifications prior to the PEI buyout. The FAL pilots and other FAL employee groups negotiated an agreement wit PEI in October 1985. The agreement provided that: (1) FAL pilots would continue to receive the pay rates, benefits and terms and conditions of employment contained in the ALPA agreement at Frontier; (2) FAL pilots would be covered by a "no furlough" agreement absent unusual specified conditions; (3) PEI would not sell FAL assets over $25 million and would maintain a minimum aircraft fleet at FAL; (4) PEI would operate FAL as a separate

entity until at least February 1, 1990; (5) PEI would not, in effect, sell stock of FAL to TAC-CAL; (6) PEI would provide FAL with operating funds and enhance FAL as a viable carrier; and (7) In the event of a merger of PEX and FAL operations, the seniority lists would be integrated in a fair and equitable manner by arbitration if necessary. These provisions extended better rates of pay, benefits and terms and conditions of employment to the FAL pilots than the PEX pilots enjoyed.

PEI violated ever term of the October 1985 agreement.

When PEX took over FAL, FAL lost all control over its own destiny, and PEX, largely employee and pilot owned, ran FAL in to the ground and ultimately shut it down in a misguided bargaining tactic during the negotiations for its sale to United. While FAL had an operating loss of $40.7 million in the first three quarters of 1986, PEX had operating losses in the same period of $120.1 million. Thus, the FAL losses were more than offset by just the $46 million PEX took from the sale of FAL assets to UAL, and there is no basis for the claim that the FAL operation was bleeding PEX's cash position. Indeed, in June and July 1986, FAL

was actually transferring money back to PEX.

Texas Air's proposal on September 15, 1986 required that the purchase of People Express could only go forward after the sale of Frontier, the signing of the JPA and a

waiver of claims by the FAL employee unions. The terms of those documents included: (1) termination of the FAL-ALPA agreement and agreement to CAL wages and working conditions, including no longevity pay for FAL pilots; (2) termination of the pilot retirement funds; (3) termination of the October 1985 agreement with PEI, including the no furlough agreement; (4) waiver of all soft claims against TAC/CAL/PEI valued at $145.6 million for the pilots; and (5) a seniority integration arbitration procedure requiring the arbitrator to recognize the non-operating status of FAL and the entitlement of the CAL pilots to certain aircraft on order to CAL as of September 15, 1986.

As a matter of equity, there is no way that the FAL pilots as a group can be placed junior to the PEX pilots whose very jobs and "fair and equitable" seniority integration depended entirely on the FAL pilots execution of the JPA. PEX negotiated away the seniority rights of the FAL pilots when it violated (without PEX pilot protest) every provision of the October 1985 agreement and by October 1986 had no cash or other assets to pay the FAL pilots for those violations.

A comparison of the assets brought to the merger by FAL and PEX demonstrate the superior equities of the FAL pilots to the PEX pilots. FAL brought to the merger a much newer and homogeneous fleet than did PEX, and the Company erroneously gave PEX credit for five B-747s. FAL

contributed its modern terminal and facilities at Denver,

while PEX never operated out of Terminal C or paid for any of its construction. Frontier's turnkey operation enhanced its value to CAL, in contrast to the serious serve problems encountered in the integration of PEX. Continental's exercise of the option to buy Frontier stock added significant value to the deal when TAC changed the nature of the transaction from a purchase of assets to a true merger. As a result, TAC/CAL became the debtor-in-possession of the Frontier estate of $112.6 million. TAC/CAL gained a total $8 million from the over-funding of the pilots pension plan and related actions – more than CAL paid out to the PEX pilots in debt forgiveness. The values of People Express and Frontier viewed by themselves and interested third parties have been consistently higher for FAL than PEX, even after FAL was placed in bankruptcy.

The pilot equities of the FAL pilots are vastly superior to those of the PEX pilots when measured by the primary factor of date of hire/length of service. There is no fundamental inequity in this case that should obviate the use of this factor in constructing a seniority list. People Express was, like Frontier, a carrier with an uncertain future. If FAL brought no real jobs to the merger because it was shut down, then certainly neither did PEX, which would have liquidated within weeks, if not days, after the failed attempt to sell Frontier to United.

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Also, the evidence is overwhelming that PEX would not have been purchased by CAL had not PEI also owned FAL and had no the FAL pilots agreed in the JPA to have FAL assets transferred to CAL.

The promotional expectations of the FAL captains were to remain captains and retire at age 60 as captains, and those of the FAL first officers were to promote to captain due to the normal age 60 attrition within the captain ranks. This natural expectation was not the case among the younger PEX group in their overstaffed system. The FAL proposal

enables the FAL pilots to live out their careers with some minimal dignity rather than stripping from them what little remains in the aftermath of the CAL-FAL award. The PEX first officers should be satisfied with the promotional expectation they currently have – a promotion to captain which they would have been unlikely to achieve at PEX for another 20 years if the airline had survived.

The vastly superior pay and benefits of the FAL pilots coupled with their length of service were factors in Continental's decision to give the PEX pilots full longevity for purposes of pay and benefits and to deny the FAL pilots this longevity. Arbitrator Nicolau found that any consideration of longevity pay based on general notions of equity and fairness was foreclosed by the language of the JPA. In the present Arbitration, where the only standard is the notion of fairness and equity, there is no such

preclusion. The District Court's Order does not preclude the FAL pilots from seeking a longevity pay level comparable to their counterparts at CAL and PEX. This request harms neither of these groups, and would have no back pay consequences to the Company if implemented on a prospective basis.

There is also a great disparity between PEX and FAL with regard to working conditions, including retirement and contractual benefits. FAL's benefits were consistent with the benefit packages extended by other major airlines operating under a union contract. Beyond that, the FAL pilots were contractually protected under the October 1985 agreement. The FAL retirement plan was spectacular, with most senior of FAL pilots receiving over $500,000 in vested retirement benefits, and a pilot at the top third has received between $165,000 and $204,000 upon retirement. This is in stark contrast to the PEX pilots who had no retirement plan.

The "sweat equities" contributed by the FAL pilots far exceed those of the PEX pilots when considering: the series

of wage reductions and work rule modifications totaling $47.8 million for the pilots; the damage resulting from PEI's violations of the October 1985 agreement; and agreement to the JPA. With respect to the PEX pilots, there is no showing of any willingness to make wage and work rule concessions until a wage cut was instituted in late 1986 when it was too late. Indeed, instead of

giving up sweat equity, the PEX pilots were personally awarded $8.2 million in debt forgiveness and $3.2 million in related taxes as well as full longevity for pay and benefit purposes.

Although domicile is not controlling issue, it is relevant to the extent that the FAL pilots were based in Denver and the PEX pilots were based in Newark. The FAL Committee has proposed a fence (with restrictions) for the benefit of PEX pilots who shall be entitled to be awarded a maximum of 295 captain vacancies in the Newark base regardless of their system seniority in relation to all other CAL pilots, including FAL pilots.

A staffing comparison reflects that Frontier was lean and understaffed while People Express was greatly overstaffed and required 232 captains based on actual staffing requirement at PEX in December 1986. For a virtually defunct airline, the actual December 1986 staffing is an appropriate yardstick.

The FAL Committee used the following criteria in structuring its proposed integrated lists: (1) The integration proposal must be fair and equitable to each pilot group. (2) It must primarily recognize length of service as a pilot. (3) It should seek to: preserve jobs; avoid windfalls to any group at the expense of the others; maintain or improve pre-merger pay, standard of living and pre-merger pilot status; and minimize detrimental changes to career expectations. (4) It should accomplish the above

by reference to the economic condition of the airlines involved (and the reasons therefore), the equities that each airline and pilot group brought to the merger, and the nature of the transaction that resulted in the merged airline. (5) All attrition occurring within each pilot group after the effective date of the transaction resulting in the merger should be regarded as a benefit to be shared equally by all pilot sand not by any single pilot group. (6) The resulting integrated list should continue to be fair and equitable during the entire careers of all the pilots on it.

Even under a finding that FAL and PEX were "in the same boat" in terms of financial strength, a date of hire or length of service proposal would be favored because both carriers would be regarded as similarly situated.

The quid pro quo sought for the fence protection is that the named FAL pilots from the March 12, 1987 list between numbers 163 and 202 who remain on the list as of the date of this Award be pay protected as captains until the pilot either receives a captaincy or is entitled t a captaincy and declines such vacancy. At present, there are 25 such pilots who not only were flying as captains on FAL before the shutdown, but who were entitled, using the PEX staffing ratio (295 captains divided by 60 aircraft equals 4.92 ratio), to captain positions at FAL (41 aircraft multiplied by 4.92 equals 202). In other words, if 295 (now 219) captain jobs are to be

protected, at least 25 more FAL pilots should be pay protected as captains.

The Company's list is unfair and inequitable t the FAL pilots. It fails to give appropriate deference to date of hire/length of service. It gives B-747 positions to PEX pilots after previously allocating them to CAL pilots. It improperly integrates PEX flight engineers with FAL pilots. It erroneously placed all FMRs in a block after the last FAL pilot when they were not industry-qualified pilots and lacked the experience and qualifications that Continental required of

its own 1987 new hire pilots.

The Company

As in all prior airline arbitrations, the Arbitrator's duty here is to fashion an integrated seniority list that preserves the pre-merger career expectations of the respective pilot groups. The primary considerations in making this assessment is the economic viability of the carriers at the time of the acquisition and in the few years immediately preceding. This clearly is the standard because an airline pilot's career expectations are tied (for better or worse) to the economic health and future viability of his or her airline. The PEX pilots have the burden of proving that they had good promotional expectations. In the summer of 1986, the career expectations of the CAL pilots were strong and

growing, and Continental did not need to acquire PEX or any other carrier to survive and reach its present size. PEX and FAL pilots are now largely first officers and captains in the nation's fifth largest airline. Newark is only a part of Continental's system, which includes major hubs and facilities at Houston, Denver and Cleveland and major international operations in Mexico, Japan, the South Pacific, Latin America and Europe. By year-end 1985, Continental had developed a worldwide network of operations, without any help from PEX, including 52 domestic and 28 foreign cities. In particular, CAL also commenced service from London to Houston. During 1986, Continental added 30 new destinations. On September 5, 1986, the DOT granted Continental a Denver to London route. By year-end 1986, CAL was about double the size of PEX. It could have simply sat back and waited to pick up PEX's aircraft and facilities after liquidation, which was assured. Neither TAC nor CAL had the power to, nor did they, exert control over PEX's operations before the acquisition was consummated.

In fact, the merger announcement actually helped PEX's situation, as did Texas Air's $107 million in cash infusions between September 15 and December 18, 1986. In September 1986 and thereafter, PEX had no alternatives to liquidation other than TAC.

On February 1, 1987, PEX began operations under the Continental name, and the problems of PEX were thrust upon Continental, including an operational nightmare in Newark

that severely damaged Continental's reputation and caused it hundreds of millions of dollars in lost revenue, as well as onerous operational contracts and facilities leases that were inherited. By early March 1987, the PEX Committee had rejected the NYA-type integration structure. After discussions and meetings with the pilot group representatives, the Company made a good faith determination that it was in the best interest of the airline for management to itself construct an integrated list rather than go through yet another divisive arbitration, which would indefinitely delay the promulgation of a combined list and the benefits to all pilot groups that such a list would provide.

The first step in the Company's list was the determination that Continental could utilize 295 PEX pilots as captains and 779 pilots in total, according to CAL's utilization of the PEX fleet. The Company also adopted PEX Captain Fred Abbott's input as to the number of captaincies the PEX pilots should receive.* The staffing determination was made using the method by which CAL's own staffing requirements were determined. The number of block hours used produced the same number of captain positions to which the PEX pilots would otherwise have been entitled had PEX been able to survive independently.

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* Captain Abbott was the number 12 pilot on the PEX seniority list and Chief Operating Official for PEX at the

time. He was also the founder of the PEX Committee.

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The pilot utilization rate applied in the staffing determination was also fair and equitable because it was consistent with CAL's utilization rate for its own pilot work force. The 295 PEX captains were to be placed junior to the last CAL captain on Bid 87-1; the PEX non-captains hired before the acquisition; and the FMRs were to be placed after all the integrated non-captains but before any 1987 hires. None of the 950 PEX pilots remaining on March 12, 1987 was furloughed, despite CAL's need for only 779 PEX pilots. The CAL-FAL award placed 162 former FAL captains after the last CAL captain awarded a captaincy on Bid 87-1. The award then reserved a block for CAL first officers based on new equipment coming to Continental, followed by a ratio of remaining CAL and FAL first officers, and concluded with recent FAL hires at the bottom but before the 1987 CAL new hires. The Company believed that Arbitrator Nicolau's approach ratified the fairness of its proposed CAL-PEX list. On June 30, 1987, Continental held a meeting of the pilot groups in Houston and removed itself from the process, hoping that the CAL and PEX Committees could work out a list. When they were unable to reach any agreement, the Company was faced with the decision of how to integrate its March list with the CAL-FAL award.

The Company tried to look at all of the respective equities existing between the PEX and FAL pilot groups.

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Frontier and PEX were not that far apart in value, as established by the fair market prices of $158.1 million for Frontier and $122.1 million for PEX (including Britt and PBA). Both were national airlines, as opposed to majors. Both carriers had failed. Neither pilot group had employment prospects. They both moved from a one-hub

carrier to a multi-hub carrier with more equipment. FAL pilots waived claims allegedly worth up to $141 million, whereas Continental forgave PEX pilot stock debt of $8.2 million and paid $3.2 million in taxes on the debt. FAL pilots lost their retirement, and PEX had no such fund. The FAL pilots had traditional job duties, and the PEX pilots were no longer cross-utilized. The PEX pilots gained traditional seniority which the FAL pilots already had. The PEX bid trips by lottery, whereas the FAL pilots used seniority. The top FAL captains were hired in 1955-56 and the top PEX captains in 1980-81. The bottom FAL captains were hired in 1968, and the bottom PEX captains in 1983. FAL was a long-term carrier with status earned over time, and PEX was a "start-up" carrier with "instant" captains. The FAL pilots had overall superior longevity as compared to the PEX pilots. In short, the PEX pilots obtained more than the FAL pilots from the acquisition by virtually every measure.

The Company decided that a fair solution was to integrate the FAL and PEX captains and non-captains by date of hire and place the FMRs below all other pre-acquisition

pilots but ahead of the 1987 CAL new hires. This list, in force on the property for more than three years, is very fair. It places the PEX captains in the "hard" captain seniority range without encroaching on the superior career expectations of the CAL captains. The fairness of the list is affirmed b the subsequent integrations of the PEX flight attendants and ground agents, both of which groups received considerably less favorable treatment than the PEX pilots. Of equal importance, the Company's list also properly balances the equities of the pilots from the two failed carriers, PEX and FAL, relative to each other. It also properly places the FMRs giving due account to their unfinished training and most junior status at PEX, while

placing them ahead of pilots who were hired by the Company at a later date.

Since the Company's list is fair, it should not be changed to one of the pilot proposals even if any one of them were also fair (which none of them is). Arbitral precedent defines the Arbitrator's charter not to devise a perfect list, if such a thing exists, but one that is fair and equitable on the whole. The District Court's standard of "fair and equitable," an undefined term common to all prior arbitrations, requires the outcome to be "fair and equitable" in its totality; it is not limited to the effect on the pilots. Under the Order, the Company is an equal party to this Arbitration. Under the fair and equitable standard, there is no rationale for

saddling the Company with the operational and financial costs that would be associated with moving from one list to another, even assuming that one of the pilot committee proposals were also fair.

The three pilot committee's proposals are flawed in a variety of ways. The PEX Committee ignores: (1) the economic condition of the carriers and the relative promotional expectations of their pilot groups; (2) longevity, especially with regard to the FAL pilots; and (3) the benefits that they received from the acquisition. Furthermore, there is no factual basis for the PEX Committee's distinguishing between wide-bodies and narrow-bodies (while at the same time excluding A-300s from the wide-body category), particularly at Continental where no base pay differential exists for flying wide-bodies and where pilots do not "chase equipment". In addition, the use of post-merger attrition in the manner utilized by the PEX Committee's proposal has been rejected by arbitral precedent and is on its face, unfair to CAL and FAL pilots. Nor is there any validity in the PEX Committee's use of 1,061 PEX pilots employed in September 1986, when the Court has determined that the Committee only lawfully represents the 950 pilots who were

employed at Continental on March 12, 1987.

The Company's list is fair and equitable because it fairly balances the expectations of pilots from a failed carrier with those from a growing carrier, and it fairly

balances the equities of pilots from two failed carriers.

The Company's list also fairly places the FMRs behind the other PEX pilots but ahead of new hires, and it does not integrate the FMRs with the FAL pilots by date of hire. At the time the FMRs joined Continental, they were not qualified to fly as first officers under CAL's flight time requirement of 2,500 hours in 1987. Therefore, Continental sent them to its commuter operations in order to gain additional flight experience, just as PEX intended to do in 1986. In addition, the FMRs joined PEX during the period when it was experiencing its financial downfall. Thus, by virtue of their hire dates, the FMRs did not bring the same equities as the more senior PEX pilots. Contrary to the CAL and FAL Committees' proposals, the FMRs' seniority should be determined by when they were hired by their ancestral carrier, as was the case with all the other pre-integration pilots. They were part of the same package of pilots and equipment that Continental began holding out to the public as its own on February 1, 1987.

The financial condition of the carriers shows that the CAL pilots had positive promotional expectations at the time of the acquisition, while the PEX pilots had no objective promotional expectations. Continental was setting traffic and financial records from 1984 until the PEX acquisition. CAL's 1983 bankruptcy was merely done to reorganize its financial position, and it was a

highly successful endeavor. Continental did not need PEX to survive or to attain its present size. It was on a strong

growth trend from 1984 to 1986 in a market with no shortage of aircraft in 1986, especially B-727s, B-737s and B-747s – the types of planes used by PEX. Continental was already developing its Newark hub at that time and, even without PEX, probably would have done so. There was no shortage of pilots in 1986. The Company's current bankruptcy, filed for on December 3, 1990 to gain relief from the interest expense inherited largely from PEX in 1987, is irrelevant to these proceedings. PEX was a failed airline by September 1986, and it had been "dying" for at least a year prior. Its failure was due to several causes. The "no frills" concept was no longer viable. Over-expansion had pushed PEX into the wrong cities and into competition with major carriers that had superior technology. Its rapid expansion in late 1984 and 1985 increased operating and interest expense costs and operational problems. The most pervasive reason why PEX could not compete with the major carriers was its lack of a sophisticated computer reservation system, which the majors used to underprice PEX. In addition to internal expansion, PEX mistakenly tried to grow by acquisitions. PEX lacked a traditional management and support infrastructure. Finally, it antagonized travel agents through low commissions, telephone delays and unanswered calls.

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The proof of PEX's failure takes several forms. At the time of the acquisition, PEX had neither the equity nor the cash to operate. Its cash balances fell steadily and dramatically from late 1984 on. By June 23, 1986, when PEX announced it was for sale, the company was "technically insolvent" because it was out of cash and had an inability pay bills. PEX's cash flow is not a meaningful indicator, and even if it were, the trend at PEX as very negative in all four quarters of 1986. Although PEX grew from 1981 to 1985, it did not put in a good financial performance, as properly measured by net income. Over its six-year existence, it lost $214.8 million. The Company

never obtained net cash from operations, but rather from financings. By July 1986, the financial markets were completely shut to PEX. By September 1986, there was n remaining significant equity in its collateral on which additional financing could or would be based. Another indication of PEX's poor financial shape was its general retrenchment, including downsizing of its fleet. The B-747s were high cost, money-losing planes for PEX, and the market for them was soft in mid 1986. The August 1986 Business Plan also contemplated downsizing the B-727 fleet by eight planes. The result of the fleet downsizing was a corollary cancellation of service at five cities, with five more on the immediate "watch" list and an overall 14 percent fewer block hours. On October 16, 1986, PEX sold all of its interest in another six B-727s

to NYA, and the planes left PEX's property on November 15, 1986. In sum, on September 15, 1986, PEX could only count 71 planes in its fleet, and on November 15, it had only 65 planes left, and one B-747 on order that it could not afford to take delivery of, but which the Company credited to the PEX pilots in its proposal. Because of PEX's low fare strategy, to be profitable it needed exceedingly high load factors, which it could not come close to meeting in September 1986. Long before the announcement of the TAC-PEI deal, PEX had experienced a steady decline in traffic and consumer loyalty. It also was too dependent upon leisure travelers, and it did not have a business traveler following which it belatedly attempted to pursue. PEX was ready for liquidation in September 1986, because its operating philosophy and industry changes had foreclosed the possibility of reorganization. At the time of its failure, PEX had already pushed its operating cost to an industry low level.

The September 15 agreement did not give TAC control over PEX before December 30, 1986, and as a result the

PEX pilots must take responsibility for the events at PEX from September 15 until December 30, 1986. There was never any assurance that the deal would be consummated, and even if consummated, whether TAC would leave PEX as a stand-alone subsidiary or merge it with Eastern or Continental. During the period from September 15 to December 30, TAC and CAL avoided even the appearance of control over PEX.

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With regard to the six B-727s that were transferred to NYA (and later CAL), the planes were clearly TAC's, and any flying done on them by PEX pilots is irrelevant. The September 15, 1986 Acquisition Agreement permitted TAC to have its designee purchase 12 B-727s, an aspect of the deal that was not conditioned on consummation of the rest of the deal. The first six planes were sold to NYA, and because PEX needed them to fly its fall schedule and survive, NYA allowed them to stay at PEX until November 15, after which they became part of Continental. TAC never took delivery of the other six B-727s, because PEX had so few uncollateralized assets by October 1986 that it could not give TAC the sufficient security, and further because their loss would adversely affect PEX's system.

The September 15 announcement of TAC's acquisition helped PEX's traffic and boosted consumer, shareholder and employee confidence. The announcements that really hurt PEX in 1986 were its announced decision on June 23 to search for a buyer and the announcement on August 28 that it had put Frontier into bankruptcy.

PEX had no alternatives other than Texas Air. Massive efforts to find another buyer had failed. No one else was ever interested enough to make an offer. None of the unionized carriers wanted to acquire PEX, since it was in their economic best interest to see it disappear. America West never made an offer to acquire PEX, and it was not

interested in doing so. A "turnaround plan" would

not have saved PEX, and no such plan had actually been formulated.

Continental's determination that the PEX pilots were entitled to 295 captain positions was fair and equitable. Contrary to the claim by the PEX Committee, Continental does not staff at the levels required in the peak flying months. Rather, it determines the number of crews required to meet its flight schedule on each of the months expected to be covered by a system bid, examines the high and low points, and picks a staffing level in between. The PEX staffing determination was strictly a business decision, made in the ordinary course of business by the management official responsible for making such decisions. Because Continental was the acquiring carrier, its business judgment, rather than that of PEX, governed the determination of the variables in the staffing equation (block hours and pilot utilization rate). Continental made the PEX staffing determination in late February or early March 1987, using the method by which its own staffing requirements are determined. The Company had no obligation, legal or otherwise, to use the peak month flying hours in 1987 for PEX aircraft. Additionally, operating forecasts and the resulting staffing projections are constantly revised, and the Company's PEX staffing determination in March 1987 was fair and equitable under the circumstances existing at the time. The block hours used were fair and equitable, and they produced the same number

of captain positions that PEX would have needed under its Business Plan had it been able to survive. Moreover, the Official Airline Guide for the period October 1986 through January 1987 shows that PEX had projected a significant

reduction in block hours either consistent with or below those contained in the Business Plan. In this regard, the unequivocal testimony of the CAL manager in charge of staffing was that CAL had no control over PEX's staffing during the fall of 1986. The pilot utilization rate applied in the PEX staffing determination was fair and equitable. The figures were obtained from the PEX head of manpower planning in order to confirm consistency with the Company's figures for the entire pilot population including management pilots. Because the utilization rates were essentially the same at both airlines, the PEX rate was used. Block hour utilization always contains management pilots. Even assuming that the PEX utilization rate did not account for management, Continental was under no obligation to adopt PEX's management structure; and CAL's own figure for pilot managers was only five percent, thus yielding only 13 more captain positions than were credited for the PEX pilots.

The respective pilot committees' staffing analyses only reinforce the conclusion that the staffing determination with regard to PEX was fair and equitable. The CAL Committee's staffing analysis is flawed because it is not, on balance, a true staffing analysis based on a

forecast of requirements during a future month or bid period. The FAL Committee's staffing analysis, like the CAL Committee's theory, is based on the actual PEX requirements during December 1986. Moreover, it is based on the number of captains PEX required under PEX's schedule, as opposed to the essence of the PEX staffing determination – the number of captains CAL required under CAL's schedule. The FAL proposal is further flawed with respect to the B-747s, because it proceeded from the false premise that by including the flying time generated by five 747s in System Bid 87-1, CAL was excluding those aircraft from the PEX operation. The effective date of System Bid

87-1 was December 15, 1987. Thus, the fact that the bid included B-747 flying time in the Pacific did not mean that CAL was intending, at the time the PEX staffing determination was made, not to utilize those aircraft in the CAL-PEX operation during 1987. The PEX Committee's staffing analysis is based on a "crews per aircraft ratio" method that is an imprecise and unreliable staffing method. It is in fact a fiction because the crews per aircraft ratio is the result of the block hours analysis, not its functional equivalent. By definition, the ratio changes any time the variables in the staffing equation – block hour sand pilot utilization – change.

System Bid 87-1 was not issued in anticipation of the Company list at issue. It was posted on January 27, 1987, approximately six weeks before the Company decided

to construct it's own integrated list. The bid was necessary to accommodate the projected growth of CAL throughout the remainder of 1987. On September 12, 1986, the CAL pilots were anticipating the arrival of 104 aircraft on order and option. The timing of Bid 87-1 was a business decision designed to accomplish the training required by the influx of new aircraft, not to upgrade CAL pilots to captain positions at the expense of PEX pilots.

The Company properly determined the PEX captain cut-off on the integrated list from the only available PEX list. That the Company's list "split" a class of PEX captains does not demonstrate unfairness. The 295th PEX pilot had moved up to number 288 by March 12, 1987, due to nominal attrition among the PEX pilots. The 288 number is only one number less than was produced under the Company's staffing analysis of PEX's requirements. The six additional PEX captaincies were given at the request of PEX management and not on the basis of staffing. Therefore, PEX is not entitled to any additional captaincies based on the Company's analysis and construction of the seniority list.

Promotional expectations of the pilot groups should be considered as a September 15, 1986. However, there is no basis for using that date for all other purposes. Texas Air had no control over PEX before the acquisition was consummated on December 30, 1986. Thus, the equities of any aircraft or other assets attributable to PEX should

be measured as of that date, if they become a factor in constructing the integrated list. Indeed, the Company gave PEX credit for all 66 aircraft in the PEX fleet as of December 30, 1986, even though TAC had paid for the 66th plan – the B-747 that PEX could not afford. As for the number of pilots used in constructing the list, that is to be measured as of March 12, 1987, which is the date used by the Company in constructing its list. Moreover, the District Court ruled that only those pilots still working for PEX on March 12, 1987 are part of the class.

The PEX pilots are not entitled to special consideration because of the Newark hub, Terminal C or other non-fleet assets. Those assets, even if they are considered within the context of career expectations, do not justify giving the PEX pilots any special consideration that will counterbalance their extremely negative job prospects before the acquisition. This is so because any consideration of the benefits to Continental from the assets must also weigh the harm. The evidence is overwhelming that PEX saddled with enormous costs in terms of loss of customer goodwill and soaring consumer complaint rates resulting from the difficulties incurred in trying to absorb the chaotic PEX operation. There were also other unexpected surprises, such as onerous contracts that Continental had to assume. There were increased debt expenses, capital improvements to PEX's fleet and facilities, and lease payments on unproductive space. In

contrast, the merger of Frontier's operations went extremely well, because of the experience of the FAL employees and a traditional management structure in operating a full service airline. Many of the operational and financial burdens thrust upon Continental were attributable to PEX's practice of contracting out traditional or core services, and under cross-utilization, assigning inexperienced employees to handle the contracting out function.

Continental was successfully building a Newark hub even before the acquisition of PEX, and any airline was permitted to use the international arrivals gate at Terminal C. There also were no high density airport slot constraints at Newark, and CAL and NYA had existing market presence in the New York City area. Newark is not CAL's largest hub, and is only part of a large, worldwide operation.

The PEX pilots should not receive special credit for Terminal C. TAC did not acquire Terminal C through PEX. Indeed, PEX would have lost its lease to Terminal C. The lease held by PEX for most of 1986 and 1987 was commercially worthless. PEX did not bring a 25-year lease to the merger negotiations with CAL. The merger was not motivated by Terminal C, and TAC obtained the lease on its own. There was an absolute prohibition against PEX subleasing Terminal C without the Port Authority's written consent. Even after PEX had been combined with CAL for marketing purposes on February 1, 1987, the Port Authority refused

to guarantee that CAL would be allowed to take over PEX's lease. In fact, the Port Authority could have assigned the lease to any other airline on 30 days notice to PEX. The assignment was effective August 15, 1987, the first time that Continental had a contractual interest in Terminal C and control of the lease. PEX should not get credit for designing the terminal. Only two-thirds of the building, domestic concourses C-1 and C-2, was actually covered by the lease,

and the structural shell of the departures level main building was erected by the Port Authority in 1971. Nor was the international arrivals gate part of the lease. PEX never completed its design for the terminal. The work that it did complete was not designed for the efficient functioning of a traditional carrier. Numerous functional aspects of the terminal had to be corrected before CAL could occupy it. Indeed, since PEX itself was aspiring to become more traditional, it too would have had to alter Terminal C had it been able to survive. The largest design deficiency in Terminal C was the baggage system and the concomitant design problems it dictated for the rest of the terminal. As a non-traditional carrier, PEX did not have the same need as most normal carriers for baggage drop-off at curbside and at the departures level ticketing counters. Consequently, PEX's system could not handle the volume of baggage attendant to a major airline like Continental. The addition of the necessary 50 additional ticket counters

along the front of the "window wall" also had the unfortunate side effect of practically eliminating the value of the passenger display flight system, because it is now very difficult to read the information on those signs; but moving them would be cost-prohibitive and would eliminate their intended value of providing flight information near the ticket counters. The baggage claims carousells were only marginally adequate for CAL. The baggage system was not fast enough to handle traffic during CAL's peak departure times, and it could not handle oversized bags and skis, which have to be either driven or carried by hand to the planes. CAL paid $577,619 just to install an oversized baggage system and $5 million in total changes to the main baggage system. In installing a direct feed from the apron level to the baggage claims carousels, Gate 70 (a prime, close-in gate) has been lost until 1993 or 1994, at which time it will cost CAL $12 to $15 million to fix the problem. PEX's design of

Terminal C also posed problems for CAL with respect to the number of wide-body gates and jetways. Another significant design deficiency, which cost CAL about $4 million to remedy, was the failure of PEX to provide office space for a traditional airline operation. These design deficiencies must be taken into account because Terminal C was not adequate for any traditional carrier. CAL paid for the construction of the terminal, and PEX had no investment in it. PEX's design was no more than 50 to 60 percent constructed

by October 1986. Terminal C and the North Terminal Annex project were finally closed out in October 1990 at a cost of about $280 million, of which the Port Authority had financed $225 million and CAL had financed $55 million. In addition, CAL's lease required that it invest $25 million in Terminal C for required items which would have been required by any traditional airline. CAL also will repay the Port Authority for the $225 million financing over the 25 year term of the new lease. In August 1986, PEX had built only 30 percent of the current terminal, and by August 1987, when CAL assumed the lease, only about 56 percent of the current terminal had been constructed. In short, Terminal C as it stands today owes its existence to Continental; especially the interior seen by the traveling public and the functional elements of the building that serve the public.

The PEX pilots should not receive special credit for other assets acquired along with PEX. These facilities were not "turnkey" in nature, as demonstrated by the large amount of work that was required for CAL to absorb them. Moreover, other items were not useful to CAL, and others still were not even assets of PEX. When compared to the rest of CAL's facilities throughout its vast system, the facilities contributed by PEX are not the key to Continental's future growth. The other Newark facilities, as well as Terminal C, were inadequate. These included: the flight

kitchen and food operations; the

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Hangar 55 aircraft maintenance facility which has cost CAL $10 million and will require further expenditures; the cargo facility, a number of infrastructure deficiencies at Newark Airport, such as inadequate road frontage and parking; the unproductive North Terminal which CAL assumed under PEX's lease with the Port Authority; and two administrative buildings across from Newark Airport – the Haynes Avenue Building and International Plaza – which CAL assumed under PEX leases and which have imposed significant costs on CAL from unproductive space. Continental also inherited PEX's lease obligations on facilities at other airports, despite the fact that CAL did not have a use for all of them. Space at seven such airports has been unproductive for CAL at a combined cost of over $1.8 million through the end of the respective lease terms. Most of the PEX outstations were closed and PEX operations relocated to the better facilities of TAC subsidiaries. PEX's ground handling facilities throughout the country were in poor physical repair, a problem that cost CAL over $15 million to rectify at the outstations, not including Newark. One hundred and sixty four of the high density airport slots for which PEX claims credit were commuter slots and could not be used by regular air carriers. PEX held only 35 slots, 14 at Washington National and 21 at Chicago. The combined CAL-NYA had about five times as many slots as PEX. The PEX Committee cannot remedy this imbalance by claiming credit for the Britt and PBA

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commuter slots which were not PEX slots, and in any event were less valuable than jet slots. Because TAC acquired its interest in PEX's slots at Washington National and Chicago on September 15, 1986 as collateral for the first $10 million

cash infusion, TAC held an interest in the slots and could have seized them when PEX defaulted on the loan.

Domestic routes are not an issue in this arbitration, because a domestic certificate has no market value under deregulation where a carrier can fly into whatever domestic cities it wants to pursue. Of the three PEX international destinations, only the London route had even nominal value when it was received from PEX. The Brussels and Montreal routes had no value. The London route was losing money for PEX and was not worth very much without a great deal of marketing efforts. Although PEX had proposed flying to certain other cities as charters, those never took place. PEX had no Pacific flying. Regularly scheduled service from Los Angeles to Honolulu did not commence until December 12, 1986. Even then, the Honolulu flying was added only because PEX could not attract enough passengers on its own B-747 routes.

SAS did not link up with TAC in October 1988 as a collateral benefit from the PEX acquisition. PEX and SAS were the two extremes in providing passenger service, with SAS at the high end. SAS first approached Eastern in 1983 to discuss a link-up at John F. Kennedy International

Airport (JFK). At the same time the TAC-SAS deal was signed, SAS planned to operate three daily flights from JFK and only one from Newark. Moreover, to the extend that SAS was interested in the Newark hub, that was something that CAL could have provided without PEX.

The Company acted in good faith in imposing the seniority list. It received input from both pilot groups and acted in the best interest of all the pilots. When the PEX pilots were offered a "New York Air-type" expedited dispute resolution structure for the seniority integration, they rejected it. The PEX Committee counter-proposed considerable significant deletions and purported to mandate an operational integration of PEX and Continental, rather

than leave that decision to management. It deleted the notion of balancing the "benefits" and "losses" fairly between the two pilot groups. All references to the traditional arbitral factors, as set forth in the NYA procedures, had been deleted. The PEX Committee did not want the Company to assist the pilot groups with the payment of outside counsel's fees. One of the conditions inserted by the PEX Committee was that pilots "from both PEX and CAL will be protected in their status and category". At this point, the Company started to believe that it would not be possible to do a NYA-type expedited arbitration with the PEX pilots. The Company conveyed its position that the PEX counter-proposal was not satisfactory. The exchange of proposals was not the

only communication with PEX pilots regarding seniority integration. Both before and after the consummation of the merger, the Company talked to the PEX Committee and management pilots to get their input regarding integration. Such discussions took place as early as November 1986. On January 6, 1987, PEX's General Counsel met with the PEX Committee and its counsel to discuss seniority integration procedures and conditions. On February 12, 1987, CAL's Vice President of Flight Operations met with a PEX senior pilot who then communicated their discussions to the PEX Committee chairmen. The PEX Committee maintained its position, as stated above, it its counter-proposal. The PEX Committee also stated that it did not want to wait until the FAL arbitration was completed. These positions were unacceptable to the Company, especially the demand to start the arbitration immediately, because it could not have handled two arbitrations at once. On March 10, 1987, the Company met with the CAL and PEX pilot committees to consider their input as to whether management should construct its own list or whether the issue should be submitted to an arbitrator. One consideration was that the

Company was planning to hire 1,000 new pilots in 1987 to operate many new planes coming from Boeing and McDonnell Douglas. The Company simply could not operate all these new aircraft without a new system bid, and expediting the list gave the PEX pilots an opportunity they otherwise might have missed to

bid on this new equipment. Given the past tensions and operational problems, along with the process sought by the PEX Committee, it was determined that an arbitration would be more harmful at that time. On March 12, 1987, PEX and CAL entered into the agreement that outlined the concept for the Company's list. The agreement was signed for PEX by Captain Frederick Abbott. Despite the affirmation by Arbitrator Nicolau in taking the same approach as the Company had taken in its conditional March 1987 list, the Company still endeavored to solicit the input of the two pilot groups regarding the contingent CAL-PEX list by scheduling a meeting for June 30, 1987. The two pilot committees were unable to reach agreement at that time. Given the history and deliberation behind the evolution of the Company's list, it is impossible to say that it was imposed as an arbitrary and punitive act.

In this case, there can be no meaningful comparison of the relative compensation benefits and quality of work life of the CAL and PEX In light of the overwhelming evidence that PEX was ready to go out of business, any benefits received at Continental are superior to the alternative for the former PEX pilots (and the former FAL pilots). However, any fair and equitable list has to weigh benefits granted or concessions required as a direct result of the acquisition itself, since such items are implicitly part of the purchase price. Thus, as stated, considerations should include the PEX and

FAL pilots' continued employment; the debt forgiveness /income tax payment program for the PEX pilots versus the FAL pilots' waiver of claims against the Company' the PEX pilots' gaining of a retirement fund for the first time versus the FAL pilots' loss of their Frontier retirement plan; the PEX pilots' keeping longevity from PEX for benefits purposes versus the FAL pilots' loss of longevity for the same; and the benefit both the FAL and PEX pilots received from joining a larger system with more routes, more types of equipment and more domiciles. All of these facts are important considerations in balancing the equities as between the PEX and FAL pilots.

The proceedings in the District Court are irrelevant to this hearing. The Company wanted to avoid a protracted and divisive arbitration, and it asserted its position in good faith. When the PEX pilots required that the Court impose sanctions of the Company for defending against their claims, the Company fully justified its position and the sanctions were denied.

The evidence has shown the following basic, relevant facts. From 1984 to 1986, CAL was setting traffic and financial records, and its pilots had strong and growing promotional expectations and job prospects. It was well posed for future growth in Newark and elsewhere, and it did not need PEX to expand. From 1984 to 1986, PEX became financially weaker and ultimately was subject to

bankruptcy and imminent liquidation. The promotional expectations of its pilots were eroding, and by September 15, 1986, its pilots faced the certainty of no job prospects. PEX was financially and operationally more like its sister airline, FAL, than either was like CAL in the years immediately preceding the merger. While the FAL pilots had more longevity than the PEX pilots, the FAL pilots gave up more in the Acquisition Agreement than the PEX pilots by every measure. The Company list considers the above factors and

balances them, such that the career expectations of the pilots from the growing carrier (CAL) are preserved. The pilots from the failed carriers (PEX and FAL) are not relegated to the bottom of the seniority list but instead are given credit for their contributions to the combined entity in a way that does not overly encroach on the pre-acquisition job prospects of the pilots from the growing carrier. The Company list is based on the staffing method CAL utilizes in the ordinary course of business and was applied to each of the pilot groups in an evenhanded manner. Each of the pilot committee proposals seeks to advance the career expectations of its constituents at the expense of the other pilot groups, and each fails to give full credit to pilots from the competing pilot groups for their contributions to the combined entity.

The arbitral mandate in integrating airline seniority lists is to preserve, insofar as possible, the

pre-integration career expectations of the respective pilot groups. The single most important factor to be considered in this analysis is the pre-integration economic health of the respective carriers, since this is what dictates their future career expectations.

The Company's list is by far the best proposal to accomplish the District Court's mandate. The "fair and equitable" standard does not require a "perfect" seniority list. Rather, the list must be "fair". Even assuming, however, one of the pilot committee proposals were also fair, arbitral precedent requires that so long as the Company's compromise list is also fair overall, the argument for any change would have to be highly persuasive. Nor, in this turbulent economic time in the airline industry, would a massive alternation of the presently constituted list (at the cost of millions of dollars) be in the best interest of future, secure jobs for all pilots – including PEX, FAL and CAL.

Discussion and Findings

The most striking aspect of this dispute has been the intensity of effort and commitment of the pilot committees and counsel in presenting their positions. The divergent histories of the three airlines provided sufficient justification for each pilot group to view its interests as paramount. Frontier had a long and proud record as a quality carrier which rapidly tumbled under

PEI's control. Continental weathered intense labor struggles and difficult financial obstacles, and it emerged as a major carrier through astute financial management and employee efforts. People Express introduced revolutionary concepts in air travel and employee involvement during its nova-like existence.

These sharp differences converged in 1987, when the Company proposed an expedited dispute resolution procedure for the CAL-PEX pilot seniority integration after having spent significant time and resources in the NYA and FAL arbitrations. The PEX pilots, however, proposed a more conventional process. The parties were unable to agree on the ground rules, and the PEX Committee filed suit on April, 1978 to enforce its rights under the LPA.

The District Court's Order compels the integration of the CAL, PEX and FAL pilot seniority lists. This mandate necessarily requires a comparative analysis of the equities brought to the merged carrier by the three pilot groups.

The FAL Committee's position, as stated above, sets forth the equities brought to the merger by the FAL pilots. The record reflects that after 1985 these pilots had made heavy personal sacrifices in their attempts to keep Frontier flying. When their efforts failed, the pilots chose to preserve their jobs through their agreement to the JPA and its Sideletter No. 2 which established the guidelines for the

arbitration.

The JPA's Sideletter No. 2 required Arbitrator Nicolau to "take special notice of (a) the non-operating status of Frontier Airlines immediately prior to the date of this Agreement and the limited employment prospects for Frontier employees resulting therefrom, and (b) the fact that Frontier pilots, aircraft and assets are expected to enhance Continental's competitive position". The Sideletter further bound the arbitrator " . . . to ensure that there is no dilution or adverse impact on the promotional expectations (for Captain or First Officer status without regard to equipment type) of either (i) those Continental Airlines (including New York Air) pilots in active service on the date this Agreement is executed (based on all aircraft in service, or on firm order or option to Continental, New York Air or TAC as of September 12, 1986 . . ."

In effect, the JPA and its Sideletter No. 2 defined the respective promotional expectations of the FAL and CAL pilots in a manner which greatly restricted the FAL pilots in pressing for a full measure of recognition commensurate with their contributions to the merged carrier, under established arbitral standards of fairness and equity. Arbitrator Nicolau determined that he was required to give greater weight to the non-operating status of Frontier and the resulting limited employment prospects of the FAL pilots than the expected enhancement f Continental's competitive position through the acquisition of Frontier's

assets. Moreover, he found that the Sideletter protected the promotional expectations of the first officers as defined by Continental aircraft on order or option on September 12, 1986.

The LPA and the Order, however, contain no requirement to take special notice of the particular status of any of the carriers. Nor do they require the Arbitrator to ensure that the promotional expectations of a particular pilot group receive special protection. Rather, the LPA and the Order provide only fro a "fair and equitable integration" under which, the Order states, "[t]he parties are free to urge the neutral to consider any factor".

These critical differences between the arbitral charters of the JPA and the LPA require my analysis to focus primarily on the relative equities of the CAL and PEX pilots. To do otherwise would place the PEX pilots in the same unequal position as the FAL pilots in the CAL-FAL arbitration. For these reasons, I find that while the FAL pilots' equities must be weighed in creating a merged list which integrates the PEX pilots, the current placement of the FAL pilots on the seniority lists is one of many factors to be considered in balancing the pilot groups' equities. I have also noted that in September 1986, TAC had paid nearly 25 percent more for Frontier's assets than for all of PEI's holding which included PEX, Britt and PBA.

In constructing a fair and equitable list, I have

considered the placement of the NYA pilots on the CAL list though an arbitration award dated December 18, 1986 following hearings held from September 2 to 12, 1986. While the NYA pilots are not a discrete group in this proceeding, the timing of their airlines start up, their seniority list integration, the merger of the operations of NYA and CAL, and the CAL-PEX marketing agreement on February 1, 1987 provide other benchmarks from which the myriad number of facts and equities in this case can be weighed. The NYA captains were ratioed with a group of CAL captains and first officers following the first 651 positions on the CAL seniority list. In constructing the list in the present case, I have noted that the NYA pilots had cast

their fortunes with TAC, and in this way they shared a common bond with the CAL pilots prior to the merger. I have also considered the contributions of NYA and PEX to the merger carrier as well as their relative financial health in September 1986, without regard to whether TAC and PEI – which appear to have been committed to ensuring the success of their subsidiaries – provided a source of funding.

I find that the most compelling reason for changing the existing list arises out of the Company's basic determination to compare the equities of the PEX and FAL pilots to the exclusion of other important factors – not the least of which, as stated, was the FAL pilots' placement on the list as a result of the JPA's conditions.

Other factors which support a change in the company's list center on the contributions of People Express to the merged carrier. On the other hand, the requirement for an extreme change in the existing list is offset to some extent by the absence in the PEX Committee's proposal of any consideration of preserving the career expectations of the pilot groups as they existed prior to the merger.

Economic viability of the respective carriers is a relevant consideration in assessing the promotional expectations of the competing pilot groups. The economics of the airline industry following deregulation in 1978 forced carriers to achieve sufficient size to continue to exist as independent entities which could compete successfully in a market regulated industry with acute price competition. Deregulation made it possible for two-thirds of the new entrants to fail – a condition which would not have occurred in the government regulated market of prior years. These realities dictate that a carrier's financial condition as well as the pilot jobs and other equities brought to the merged carrier be considered in constructing a fair and equitable integrated list.

In the present case, several overriding considerations required a rejection of the PEX Committee's proposal based on a status and category ratio approach. The change of People Express surviving its grave financial difficulties in September 1986 was at best a very long shot, and at worst a foregone conclusion of failure. As a result of

excess capacity, the jobs associated with PEX's B-747 flying had been greatly reduced. In this regard, I find unpersuasive PEX's assertion that the B-747s would have been gainfully utilized in charter flying. Additionally, wide-body flying at both People Express and Continental was not and is not now paid at a premium rate. The mystique factor in B-747 flying, which is a valid consideration, does not by itself serve to justify a status and category method of integration. This is especially true in this case where such an approach would place the senior PEX pilots, hired after 1980, among the senior CAL pilots hired in the 1950s and 1960s.

During a significant portion of the hearings, the PEX Committee took on the herculean burden of demonstrating that People Express could have weathered its financial storms. While it is true that the airline was operating on September 15, 1986, the voluminous evidence in the record concerning its financial condition indicates otherwise. The testimony of top level PEX officials who attended PEX board meetings at the time of the merger and thereafter adds dimension and support to the documentary evidence. PEX's financial circumstances in 1986 were far more severe than a temporary economic setback or wide swing in performance which can occur at any time in the volatile environment of the airline industry. For this reason, a comparative analysis of the four airlines' financial performance during the five years

preceding the merger is of little relevance to a review of the promotional prospects of the pilot groups in September 1986. Indeed, a review of PEX's performance in 1985 reveals that signs of deterioration in its economic health were present when its capacity had outstripped its demand and major carriers had begun to effectively compete against its low cost strategy with their sophisticated, computerized yield management systems and full service alternatives. In early 1986, PEX lacked financial resources, marketing capability and credibility with travel agents. By the summer of 1986, People Express had fallen into an uncontrollable tailspin. If the TAC-PEI merger had not been consummated, the virtually certain alternative was bankruptcy and liquidation.

The three other airlines relevant to this integration also had problems, ranging from the non-operating status of Frontier to the debt-laden burden of Continental to the continuing need to New York Air to be supported by TAC. Except for Frontier, however, People Express was by far the weakest of the sister airlines in September 1986.

There is no convincing evidence that TAC or CAL controlled PEX's operations following the merger and prior to its approval by the PEX shareholders on December 29, 1986. Until that date, the consummation of the merger was far from a certainty. Nor did the merger hinder PEX's ability to operate during this period. To the contrary, the credible evidence indicates that TAC's

cash infusions totaling $107 million and the affiliation with Continental were positive factors in maintaining PEX's viability until February 1, 1987, when both CAL and PEX flight services were marketed under the Continental name.

I find that the Company has fairly calculated the total number of pilot positions brought to the merged carrier by PEX and required by Continental, as described above. Sixty-six aircraft was a reasonable reflection of the PEX fleet operating out of Newark in February or March of 1987, or in

mid-September 1986 after PEX had agreed to release 13 aircraft from its fleet of 79. The block hours used in the Company's staffing determination were based on a realistic projection of the flying schedule for the PEX fleet made in February-March 1987, as opposed to using a September 1986 date which did not reflect the downsizing of the PEX fleet and the reduction of block hours under a proposed business plan prepared prior to the merger. The Company's approach is also preferable to those of the CAL and FAL Committees which use PEX's December 1986 flying, thus basing their determinations on a traditionally low volume month as opposed to the conventional staffing method based on projections of future flying.

After reviewing the compensation packages, other benefits and working conditions at Continental and People Express in September 1986, I find that for the purpose of

determining relative equities based on these factors, no significant differences existed. Both airlines paid salaries well below those at the major carriers. Even assuming that the PEX captains received a $12,000 pay increase in August 1985 and absorbed a $12,000 pay cut in order to align themselves with the CAL captains in November 1986 (as opposed to a pay cut based on internal considerations), when considered in the comparison of total pay, benefits and working conditions of both carriers in 1986, this difference does not tip the scales to support a finding that the PEX pilots had significantly greater equities in this area. PEX offered a unique mix of benefits, some of which were tied to the company's financial performance, while CAL provided a more traditional benefits package. Although the record reflects certain employee dissatisfactions at CAL in 1986 in the aftermath of its labor and financial problems, there also is persuasive evidence that PEX employees had been experiencing declining morale as the airline's fortunes turned downward. On balance, the People Express work

environment – with its unorthodox management structure and cross-utilization – presented stimulating challenges and exerted strong pressures on employees, in contrast to Continental's traditional management structure, conventional employment conditions and seniority based procedures.

The contributions of People Express to the merged carrier were substantial. All of the parties acknowledge

the highly motivated and dedicated PEX pilot workforce, many of whom were hired when the major airlines were not hiring, thus allowing PEX to recruit and select the best available pilots. People Express, with its non-union status and low cost market niche, presented a highly compatible fit for Continental and removed a competitor on its east coast routes. The PEX domestic and international route structures also complemented the CAL system, although PEX's international operations – other than the London route – appear to have had little value in 1986. The PEX slots as well require some note, but their value is reduced significantly because the great majority of them were commuter slots. The PEX aircraft, while older and requiring modification for meal service and conventional seating, were a substantial addition to the merged carrier's fleet and numbered almost as many planes as FAL and NYA combined had contributed. The PEX standardized B-747s added a new dimension to the merged fleet and substantially increased Continental's international wide-body capacity.* I also have accorded some credit to the PEX pilots for the Newark hub and the other facilities in and around Newark International Airport. In the absence of other airline interest, it was PEX's initial long range.

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* I recognize that the crediting of these aircraft to the PEX pilots works yet another hardship on the FAL pilots in that the CAL pilots had received credit for them in the CAL-FAL arbitration under the application of the required terms

and conditions in that case. However, as stated, the PEX pilots should not be burdened with those requirements.

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vision that significantly contributed to the airport's growth and mobilized action on the Terminal C project. Today the Newark hub and its spokes are one of the main components in the Continental system which, due in some measure to PEX's routes and assets, has attained the critical mass required to compete in the airline industry. The fact that Continental had started building its Newark hub prior to the PEX acquisition and could have achieved its current mass without PEX reinforces the conclusion that PEX's contributions enabled Continental to fulfill its growth objectives.

In my view, however, the PEX contribution to the merged carrier can hardly be termed a highly efficient turnkey operation. The entire People Express operation – based on no frills, cross-utilization and unconventional management and organization structures – required extensive modification of, for example, baggage systems and ticket counters, prior to assimilation by a conventional carrier. Certainly, Terminal C was nowhere near completion in 1986, and the facility had to undergo massive design and construction changes to adapt it to the needs of a conventional carrier. The record contains vivid testimony describing examples of the horrendous problems and resulting lost business incurred at Newark Airport following the merger of PEX and CAL operations in early 1987 through the opening of Terminal C in late 1988 – a markedly different transition than occurred with the

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integration of the FAL and NYA operations. The other facilities in and around Newark Airport also were not highly productive and have required significant expenditures b

Continental to maintain them or to meet onerous contract terms negotiated by People Express. The outstations generally appear to have been in a state of disrepair and provided little more than a presence at the locations. And it must be noted that the acquisition of People Express added a $434 million long term debt load to Continental's already huge obligations.

By most measures, the PEX pilots gained more than they gave up in the merger. They moved from an unconventional operation filled with great challenges and even greater uncertainties to a more traditional carrier with a decidedly more promising future. The PEX pilots significantly enhanced their crew base opportunities from one, Newark, to: Houston, Denver, Cleveland, Los Angeles, Honolulu, Seattle and Guam. The diversity of schedules for the PEX pilots also increased as a result of the merger. Perhaps most important to the PEX first officers and second officers, their promotional expectations vastly improved as a result of moving to a carrier with a captain contingent which would provide continual attrition over many years, unlike the bunched distribution of the relatively young work force at their start up carrier.

Before analyzing the specific competing equities of

the three pilot groups within the above framework of general findings and principles, the status of the FMRs must be addresses. At the time of their hiring at People Express the FMRs, with few exceptions, did not have the requisite experience for selection by the major airlines, including Continental. However, they were qualified to occupy the first officer seat at PEX. If the opportunity had been available, many of the FMRs would have flown as first officers on a B-727 after one year of service. Whether or not PEX had planned to send the FMRs to its commuter airlines for seasoning and experience, I find that Continental's determination to utilize this approach was reasonable and in

most cases consistent with its background and experience requirements for pilots.

The first group of the 651 senior CAL captains on the Company's list on September 15, 1986 – the date of the merger announcement – brought equities to the merged carrier that far outweighed those of the senior PEX pilots. The dates of hire of the CAL group range from 1951 to 1972 (after which there was no hiring until 1977), whereas the PEX group was hired in the 1980 to 1982 period. Continental contributed equipment and assets providing pilot job opportunities well beyond those brought by People Express. To integrate the senior CAL and PEX captains would constitute a windfall for the PEX group.

A break in the hiring dates of the CAL pilots occurs at number 652, held by a pilot hired in 1977.

Under the CAL-NYA seniority list award, a group of 168 senior NYA captains was integrated with a group of 856 junior CAL captains. Following that block are the Frontier captains.

My prior finding with regard to the Company's placement of the NYA and FAL captains on the seniority list establish the broad parameters for measuring the reasonable career expectations of the PEX captains. The upper limit is the number one NYA pilot. The lower end is the number one FAL pilot. The great majority of the block between those two pilots is comprised of CAL pilots who are the primary comparator in this dispute.

I have weighed the following considerations in determining the appropriate integration point for the PEX captains into this block. Although the placement of the NYA pilots serves to reinforce my finding that the Company's treatment of the PEX pilots was incorrect, it is clear that the NYA pilots' career expectations were significantly greater than those of the PEX pilots. And the CAL pilots harbored even greater career expectations than their TAC counterparts

at NYA. At the other extreme, the FAL pilots' career expectations, as measured by the JPA, had been virtually decimated, notwithstanding their long service with Frontier. In balancing these career expectations and the contributions of the four airlines to the merged carrier, I find that the assets brought by People Express require the PEX captains

to be slotted somewhat below the number one NYA captain and well above the number one FAL captain. Such a placement results in the PEX captains sharing the positions below the bottom one-third of the integrated NYA-CAL captain block above the FAL captains. Viewing all hard captain positions on the integrated list, the PEX captain ratio begins well into the bottom half of the hard captain group, thereby reflecting the superior career expectations of the CAL pilots. The exact placement of the PEX captains was determined by length of service, including the strike time of CAL pilots but excluding their furlough time. The number one PEX pilot was placed in a position reflecting his length of service within the block of captains ranging from the number one NYA captain through the junior CAL captain on Bid 87-1.

Due to the difference in the career expectations of the senior PEX and FAL captains, with the latter bearing the burdens attendant to the JPA and its Sideletter*, I find that the block of 162 senior FAL captains must follow the ratioed group described above. In effect, the senior FAL captains comprise the lower portion of the hard captain positions available under Bid 87-3.

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* Conversely, I find no persuasive basis to assess the PEX pilots for their management's flagrant breaches of the October 1985 contract with the Frontier pilots.

I further find that the equities of the senior FAL captains outweigh those of the former PEX captains. The dates of hire for these FAL pilots run from 1954 to 1968, as compared to 1983 for the PEX pilots. Assuming that the jobs of the former PEX captains could have been salvaged absent the merger, they would not have occupied a captain seat under any realistic projection of flying as a downsized carrier. Of course, the FAL captains were facing even more bleak prospects. However, they brought the opportunity for Continental to revive a true turnkey operation based in a conventional facility in Denver. Additionally, their decision to preserve their jobs through the JPA enabled the PEX pilots to take advantage of the benefits of the TAC-PEI merger in the absence of any other viable alternative available in late 1986. A balancing of these relative job prospects, dates of hire and contributions to the merged carrier, in my view, results in superior equities for the Frontier pilots.

The FAL Committee's proposals regarding pay protection and longevity credit for these Frontier captains and other former Frontier pilots must be denied. The District Court's Order requires that "the integrated list shall not alter or vary Continental's employment policy". I am not persuaded by the FAL Committee's argument that Continental's employment policy is broader than the policy set forth in its Pilot Employment Policy, which covers pay policy. Additionally, the Order provides that "FAL

may not assert a position inconsistent with . . . [the CAL-FAL] Arbitration Award but shall, for the purposes of this arbitration, be deemed bound by that award". In that award Arbitrator Nicolau clearly denied the frontier pilots' request for longevity credit and effectively denied their request for pay protection.

I have apportioned the middle, or first officer, segment of the list by applying the same principles as were used in

constructing the top, or captain, portion of the list. Adopting the Company's staffing determination for the PEX first officers, my intent was to ratio the PEX pilots in a manner reflecting their promotional expectations and the contributions of People Express to the merged carrier. The conceptual upper limit to begin their placement was at the top of the block of 299 CAL order and option pilots, which included NYA pilots. The lower limit for starting the PEX ratio was the number one pilot in the block of 1262 CAL, FAL and PEX first officers established under the Company's list.* Mr. Nicolau was required to integrate the FAL pilots in a manner which accounted for the promotional expectations of the 299 CAL pilots. Therefore, he began the ratio of Frontier pilots immediately below this block of order and option pilots.

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* The block of 1262 pilots contains a ratioed group of 177 FAL pilots (143 of whom were captains at Frontier) and 579 junior CAL pilots pursuant to the Nicolau Award. They are followed by the group of FAL and PEX pilots integrated by date of hire.

I have chosen to begin the ratio at the 120th CAL pilot in the order and option block. This point was arbitrarily selected within the above stated upper and lower limits to integrate the former PEX captains – based on their equities and diminished promotional expectations – into the CAL pilots above them and the Frontier pilots below them. I have noted that almost one-third of the PEX downgraded captains (17 of whom, it appears had not even checked out as captain by September 15, 1986) had captain qualified dates in 1986.

I find that the placement of the remaining 100 or so PEX first officers and second officers should not change. These pilots had no career prospects, let alone promotional expectations, even if People Express had survived as a downsized airline. Their placement on the seniority li[illegible]

among the junior Continental and Frontier pilots reflects this fact and the relative equities they brought to the merged carrier.

The Company's placement of the FMRs immediately following the first officers and ahead of the Continental pilots hired after January 1987 shall not be disturbed. The FMRs were part of the People Express pilot group which the airline brought to Continental. Although they did not have the minimum flight hour requirements under which Continental normally recruited new hires, they were qualified pilots. As such, their equities were superior to those of the Continental new hires who had no employment

relationship with the Company at the time of the TAC-PEI merger. Any requirement at People Express for the FMRs to have flown at a commuter line does not alter the balance of the equities between them and the CAL 1977 new hires, even considering that in 1986 these CAL pilots had more substantial flying experience than the FMRs.

The resolution of this dispute required 73 hearing days and produced 16,725 transcript pages, approximately 1,000 exhibits and post-hearing briefs exceeding 1,000 pages. Hopefully, the opportunity for each part to have fully presented its case will result in a unified Continental pilot group.

AWARD

The Integrated List

The Continental Pilot Seniority List shall be integrated as follows based on a constructive September 15, 1986 list:

1. The Continental list shall remain as is from R.O. Glau to R.R. Heckenliable.

2. Immediately after Heckenliable, former PEX pilots J.F. Barrall through J.C. Walton shall be ratioed with Continental pilots G.D. Schafer through J.N. Dole on a 1 to 2.01 basis, Schafer first.

3. Immediately after Walton, insert former FAL pilots A.B. Kendell through J.W. Albritton.

4. Immediately after Albritton, the Continental list continues with N.G. Correa through J.F. Banas.

5. Immediately after Banas, former PEX pilots D.M. Miller through A.R. Parkhurst shall be ratioed with Continental pilots F.J.

Buckley through A. Rusinowitz on a 1 to 2.346938 basis, Buckley first.

6. Immediately after Parkhurst, insert former PEX pilots D.L. Hill through J.A. Berry with former FAL pilots G.L. Sims through A.E. Jones on a date of hire basis.

7. Immediately after Jones, the list continues with former PEX pilots A.M. Samad through B.M. Morris.

8. Immediately after Morris, the Continental list continues with T.J. Kratt until it end.

Conditions and Restrictions

1. No Displacements. The implementation of the integrated list shall not result in the displacement of any pilot from a status currently held, or any pilot to whom a bid has been awarded or for whom training has commenced, all as of the date the integrated list is implemented (i.e., no partial or

total system flush). This provision applies only to the one time implementation of the integrated list and not to subsequent events, which shall be governed by normal operation of seniority as reflected on the integrated list.

2. No Changes in PEP. The integrated list shall not alter or vary Continental's employment policy.

3. No Change in Relative Seniority Within Pre-merger Groups. The integrated list shall not result in a change in the relative order of: (i) any PEX pilot vis-à-vis another PEX pilot; or (ii) any CAL or FAL pilot vis-à-vis another CAL or FAL pilot as integrated by Arbitrator Nicolau on June 15, 1987.

4. Implementation. The integrated list shall be implemented as soon as possible but not later than 60 days after the District Court's approval of this Award.

Resolution of Disputes

Any dispute regarding the interpretation, implementation, or application of this Award shall first be referred to a Dispute Resolution Committee consisting

of two Company representative and two Continental, two former People Express and two former Frontier pilots. In the event the Committee cannot agree, by majority vote in which the Company and at least one representative of each of the three pilot groups concurs, on a recommended resolution of the dispute, the Company or either the Continental pilot, People Express pilot, or Frontier pilot representatives may submit the dispute to arbitration before arbitrator Jerome Ross for final and binding resolution. For the limited purpose of resolving any such disputes, the undersigned retains jurisdiction unless the period of his unavailability

exceeds six months from the date the dispute is filed with the Company.

S/S: Jerome H. Ross
Arbitrator

Dated: August 13, 1991
McLean, Virginia

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 24th day of September, 1991

Joint Application of DELTA AIR LINES, INC. and EASTERN AIR LINES, INC. For approval of transfer of certificate under Section 401(h) (Buffalo, New York-Toronto, Canada)	Docket 47390

ORDER

By this order we approve the Joint Application of Delta Air Lines, Inc. ("Delta") and Eastern Air Lines, Inc. ("Eastern") for the transfer of that part of Eastern's certificate for Route 148 authorizing scheduled combination service between Buffalo, New York, and Toronto, Canada.

Background

On January 19, 1991, Eastern suspended all of its scheduled services. Consequently, on the same day Delta applied for and received an oral emergency exemption from the Department authorizing Delta to serve Eastern's Buffalo-Toronto route.[1] On January 22, 1991, Delta commenced service on the Buffalo-Toronto route.

On January 29,1991 Delta and Eastern filed a joint application for approval by the Department under section 401(h) of the Federal Aviation Act ("Act") for the transfer of Eastern's Buffalo-Toronto route authority. The application requests processing using expedited nonhearing procedures under Subpart Q

[1] *See*, Order 91-1-46.

of the Department's regulations and notes that the transfer does not require review by the Department of Justice under the Hart-Scott-Rodino Act. The joint applicants specifically requested that the Department transfer Eastern's route by issuing a new certificate to Delta and encompassing authority to be transferred for nonstop service between Buffalo and Toronto. In addition, the joint applicants requested that we amend Eastern's certificate for Route 148 to substitute the phrase "Akron-Canton, Ohio" for "Buffalo, New York" in the first paragraph so that it reads "[B]etween the terminal point Akron-Canton, Ohio, and the terminal point Toronto, Canada," and by deleting the phrase "Buffalo, N.Y." from condition eight (8).

On February 21, 1991, the joint applicants filed their first supplemental submission to the joint application and separate motions for confidential treatment of various documents under Rule 39 of the Department's Procedural Regulations. The supplemental submission noted, *inter alia*, that on February 5, 1991, Delta and Eastern agreed to amend the January 16, 1991 Asset Purchase Agreement. The amendments increased the purchase price of the assets, including the Buffalo-Toronto route, from $1.5 million to $3.1 million and revised the "Due Diligence Investigation" provision to allow (21) twenty-one days from the date of the initial Asset Purchase Agreement to conduct a due diligence investigation into the use and conditions of the assets. All

other provisions of the Asset Purchase Agreement remained unchanged.

In addition, Delta revised its proposal to provide for the use of MD-88 aircraft, with the capacity to carry 142 passengers, which it currently uses pursuant to the emergency exemption.[2] Delta's Fuel Consumption and Availability" exhibit was revised to reflect the use of the MD-88. The joint applicants also submitted a copy of the Eastern Bankruptcy Court Order dated February 11, 1991, approving the sale of the Buffalo-Toronto route and certain Eastern assets and leasehold interest for space and facilities in Terminal 1 at Lester B. Pearson Airport in Toronto, Canada. Finally, the applicants request expedited action on their application.

The Department served notice on March 15, 1991, that the application was complete and that answers to the joint application were due by March 25, 1991 and replies to the answers were due by March 29, 1991. No answers opposing the transaction were filed.

The Application

The point applicants pose four main arguments in support of transferring Eastern's Buffalo-Toronto route authority to Delta. First, route transfer

[2] Delta had proposed to use B-737 aircraft, which has the capacity to carry 107 passengers.

approval would benefit the traveling public by improving the service in the nonstop Buffalo-Toronto market and would preserve single-plane service between Atlanta and Toronto.

Second, Delta claims a long-standing desire to serve the

U.S./Toronto market.[3] Delta's service in the Toronto market as a result of the oral emergency exemptions[4] represents a new entry for Delta into the U.S.-Toronto market and provides a gateway by which it can serve the Atlanta-Toronto market.

Third, the route transfer would promote intragateway and intergateway competition in the U.S./Canada market. Specifically, Delta's entry into the Buffalo-Toronto market would provide intragateway U.S.-flag competition with USAir. Furthermore, Delta would increase intergateway competition in the U.S./Toronto market by linking its hub at Atlanta on a single-plane service basis and, thus, provide broad geographical coverage for travel throughout the United States to Toronto.

Finally, according to the joint applicants, the route transfer would not conflict with international aviation policy objectives because it would improve service to passengers, strengthen the competitive position of U.S. carriers, increase overall competition, and maximize the use of bilateral route rights in a limited-entry market.

The joint applicants also assert that they do not anticipate any labor issues arising from this transaction. Eastern employees will not be affected by the transfer because substantially all of them have been given notice of termination effective as of February 2, 1991. According to the joint applicants, neither this transaction nor this type of transaction has been the subject of recent collective bargaining between Eastern and a union representing Eastern employees, or Delta and a union representing Delta employees.

Decisional Standard

Section 401(h) of the Act provides that no certificate may be transferred unless the Department approves the transfer as being consistent with the public interest. The Department has adopted as its public interest standard in such cases a policy of allowing proposed transfers provided that they do not conflict

[3] Delta and Eastern have also filed a joint application for the transfer of Eastern's routes in the New York/Newark-Montreal/Ottawa and Pittsburgh-Toronto markets. By Order 91-8-1, the Department announced, *inter alia*, that it had tentatively decided to approve the Delta/Eastern application for these routes

[4] In addition to Buffalo-Toronto, Delta was awarded an emergency *pendente lite* exemption to serve the Pittsburgh-Toronto market.

with important international aviation policy objectives and are not otherwise inconsistent with the public interest.[5]

Section 401(h) was recently amended by Section 9127 of the Omnibus Budget Reconciliation Act of 1990 to require the Secretary to certify to House and Senate Committees that the transfer is consistent with the public interest, and to submit a report analyzing the impact of the transaction on the viability of the carrier applicants, competition in the domestic airline industry and the trade position of the United states in the international market. We have considered these issues in reaching this decision.

Application of the Standard

The proposed transaction warrants approval under the decisional standard. No party has opposed the transfer. Accordingly, we will issue a final order transferring Continental/Eastern's certificate authority for the specified portion of Route 148 to Delta. In addition, we will amend

Continental/Eastern's certificate for Route 148 by substituting the phrase "New York, N.Y.-Newark, N.J." for "Buffalo, New York" in the first paragraph and by deleting the phrase "Buffalo, N.Y." from condition eight (8). We have decided to use New York, rather than Akron-Canton as requested by the applicants because New York-Newark is an active route and Akron-Canton is not. In accordance with our normal practice with respect to authority for limited-entry markets, we will limit the duration of such transferred authority to five years under section 401(d)(8)[6].

In additional, the approval of this transfer is in the public interest because it will have a positive effect on the viability of Delta by providing it with the opportunity to increase passenger revenues for the Atlanta-Buffalo-Toronto market. The transfer should have no impact on Eastern's viability, since it is in liquidation status and is not operating as a viable carrier. In any case, the transfer will provide additional funds to Eastern's estate to, *inter alia*, meet its payroll expenses to maintenance personnel who will continue to service Eastern's fleet and to management personnel who will be effectuating termination of Eastern's services.[7]

Furthermore, the transfer will promote domestic and international competition. Specifically, under the U.S.-Canada air Services Agreement, two U.S. carriers are authorized to provide nonstop service in the Buffalo-

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[5] *See e.g., Amercian-Eastern-Continental Transfer Case,* Order 90-4-11, April 6, 1990, at 7-8.

[6] *See, American-TWA Route Transfer,* Order 91-3-28, at p.19 and *Pan American-United Route Transfer,* Order 91-2-5, at p.18.

[7] Joint Application of Eastern Air Lines, Inc. and Delta Air Lines, Inc. (Joint Application) at 2-3.

Toronto market. If we do not approve the transfer of this route to Delta, given Eastern's cessation of service, there will

be only one U.S. carrier, USAir, in this market. Delta's maintenance of Eastern's Buffalo-Toronto nonstop and Atlanta-Toronto one-stop service will serve as a disciplining force to USAir. Thus approval of the transfer will enhance the level of competition in the domestic airline industry by maintaining competitive U.S. carrier service in this significant transborder market.[8] The transfer would also maximize bilateral route rights in a limited-entry market. Delta will enhance intergateway competition given its demonstrated ability to feed on-line passengers into its Atlanta hub and would provide broad geographic coverage to this market by affording passengers access to its interconnecting network. Delta offers single-plane service behind the Buffalo gateway to its Atlanta hub where passengers have on-line connections to 98 nonstop destinations with 434 daily departures.[9]

Finally, we find that the transfer will have a positive impact on the U.S. trade position in the Canadian market by facilitating continued competitive U.S.-flag services between Buffalo and Toronto and thereby strengthening the U.S. carrier presence in the market.

Motion for Confidential Treatment

The joint applicants filed separate motions requesting confidential treatment of certain documents pursuant to exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), as being "commercial or financial information obtained from a person and privileged or confidential." The applicants claim that these documents contain information regarding internal strategies, objectives and methodology with respect to competitively sensitive matters including routes, finances, expansion plans and marketing. After reviewing the material submitted by the applicants under the guidelines of Rule 39, it is our view that these documents should be granted confidential treatment, pursuant to the

exemption under the Freedom of Information Act for proprietary information, 5 U.S.C.552(b)(4).

ACCORDINGLY,

1. We approve the joint application of Eastern Air Lines, Inc. and Delta Air Lines, Inc. for transfer to Delta Air Lines, Inc., under section 401(h) of the Federal Aviation Act, of that portion of Continental/Eastern's certificate authority on Route 148, authorizing scheduled combination service between

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[8] The U.S.-Canada agreement does not provide for service in the Buffalo-Toronto market by a Canadian carrier. Thus no Canadian carrier serves the market. See Joint Application at 10.

[9] Joint application at 9.

the terminal point Buffalo, New York, and the terminal point Toronto, Canada;

2. We amend the certificate for Route 148 jointly held by Eastern Air Lines, Inc. and Continental Airlines, Inc. in the form attached, to substitute the phrase "New York-N.Y.-Newark, N.J." for "Buffalo, New York" in the listed route segment and to delete the phrase "Buffalo, N.Y." from condition eight (8);

3. We issue to Delta Air Lines, Inc., in the form attached, a certificate of public convenience and necessity authorizing service between Buffalo, New York and Toronto, Canada.

4. We grant the motions of Eastern Air Lines, Inc., and Delta Air Lines, Inc. for confidential treatment;

5. Since no party opposes the transfer, we will not entertain petitions for reconsideration of this order;

6. To the extent not granted, deferred, or dismissed, we deny all motions and requests in the docket;

7. Unless disapproved by the President of the United States under section 801(a) of the Act, this order and the attached certificate shall become effective on the 61st day following its submission for section 801 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier;[10] and

[10] This order was submitted for section 801 review on September 24, 1991. On October 17, 1991, we received notification that the President's designee under Executive Order 125 and implementing regulations did not intent to disapprove the Department's order

8. We will serve copies of this order upon Eastern Air Lines, Inc., Delta Air Lines, Inc., Continental Airlines, Inc., the ambassador of Canada in Washington, D.C., the U.S. Department of State (Office of Aviation), the Federal Aviation Administration, and the Department of Justice (Antitrust Division).

By:

JEFFREY N. SHANE
Assistant Secretary for Policy
and International Affairs

(SEAL)

Public Law 85-726 Title IV
AIR CARRIER ECONOMIC REGULATION

TITLE IV- AIR CARRIER ECONOMIC REGULATION

Certificate of Public Convenience and Necessity

Certificate Required

Sec. 401.

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified; shall be in such form and contain such information, and shall be accomplished by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon filing for such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)

(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application of a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder,

Terms and Conditions of Certificate

(e) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exerciser of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable and otherwise shall designate only the general route to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and

transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special services, without regard to the points named in its certificate, under regulations prescribe by the Board.

Effective Date and Duration of Certificate

(f) Each certificate shall be effective form the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation there under has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations there under have ceased: *Provided.* That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

Authority to Modify, Suspend, or Revoke

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for international failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided* that no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order(other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

Transfer of Certificate

(h) No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest.

Certain Rights not Conferred by Certificate

(i) No certificate shall confer any propriety, property, or exclusive right in the use of any airspace, Federal airway, landing area, or air-navigation facility.

Application for Abandonment

(j) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice

and hearing, the Board shall find such abandonment to be in the public interest. Any interested person may file with the Board a protest or memorandum of opposition to or in support of any such abandonment. The Board may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

Compliance with Labor Legislation

(k)

(1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with the decision numbered 83 made by the National Labor Board on May 10, 1934, not withstanding any limitation therein as in the period of its effectiveness.

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within the Territory of possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Nothing herein contained shall be construed as restricting the right of any such pilots and copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(4) It shall be a condition upon holding of a certificate by any air carrier that such carrier shall

comply with title II of the Railway Labor Act, as amended.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including takeoff and landing of such aircraft, and the term "copilot" as used in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in the manipulation, and who is properly qualified to serve as, and holds a currently effective airman certificate authorizing him to serve as, such pilot and copilot. ***(Emphasis added)***

Requirement as to the Carriage of Mail

(l) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefore as hereinafter provided.

Application for New Mail Service

(m) Whenever, from time to time, the Postmaster General shall find that the needs of the Postal Service require the transportation of the mail by aircraft between any points within the United States or between the United States and foreign countries, in addition to the transportation of mail authorized in certificates then currently effective, the Postmaster General shall certify such finding to the Board and file therewith a statement showing such additional service and the facilities necessary in connection therewith, and a copy of such certification and statement shall be posted for at least twenty days in the office of the secretary of the Board. The Board shall, after notice and hearing, and if found by it to required by the public convenience and

necessity, make provision for such additional service, and the facilities necessary in connection therewith, by issuing a new certificate or certificates or by amending an existing certificate or certificates in accordance with the provisions of this section.

John G. Loomis, Esq
14260 SW 153 Pl
Miami, Fl. 33196
(305) 233-4005
(305) 233-9511 Fax

NATIONAL MEDIATION BOARD
2002 JAN 29 P 12:14

January 29, 2002

Via Telefax to (202) 692-5086

Ms. Carol Conrad
Senior Assistant
Arbitration
National Mediation Board
Washington D. C. 20572

Re: Eastern Airlines Inc., Continental Airlines Inc., and Continental Airlines Section 13 LPP arbitration

Dear Ms. Conrad,

This letter is a follow-up of Ramon E. O'Neill's telephone request that the National Mediation Board furnish the undersigned with a panel of seven neutrals from which the parties to the above dispute may select the arbitrator who will chair the aforementioned LPP arbitration.

It would be most helpful if the individuals whose names are proferred have served as arbitrators on arbitration boards created by a collectively bargained agreement and/or as a neutral assigned to the System Board of Adjustment

established under the provisions of the Railway Labor Act,as amended.

Four such names that come to mind: Richard I. Block, Frank Elkouri, Richard Kasher, and Jerome Ross. Needless to say, seasoned arbitrators who have experience integrating the Pilot System Seniority Lists of merged airlines will be better poised to expedite the hearing portion of this LPP arbitration and to prepare his or her opinion and award in a timely fashion.

Yours very truly,

s/ John G. Loomos

BANKRUPTCY CODE RULE 6006

Rule 6006. - Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease

(a) Proceeding To Assume, Reject, or Assign

A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by **Rule** 9014.

(b) Proceeding To Require Trustee To Act

A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by **Rule** 9014.

(c) Notice

Notice of a motion made pursuant to subdivision (a) or (b) of this **rule** shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.

(d) Stay of Order Authorizing Assignment

An order authorizing the trustee to assign an executory contract or unexpired lease under Sec. 365(f) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise

BANKRUPTCY CODE RULE 9014

Rule 9014. - Contested Matters

(a) Motion
In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

(b) Service
The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.

(c) Application of Part VII Rules
Unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

(d) Testimony of Witnesses

Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

(e) Attendance of Witnesses

The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify

,IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:	) Chapter 11
	)
CONTINENTAL AIRLINES INC	)Case NOS. 90-932
Et al.	)Thru 90-984 (MFW)
Debtors	)

OPINION 1

Before the Court is the Amended Motion of Continental Airlines, Inc.("Continental") seeking an Order compelling the Eastern Arbitration Group, Inc., and its individual members ("the EAG"), and the Eastern Pilots Merger Committee and its individual members ("the EPMC")(collectively, "the Respondents") to comply with Orders of this Court and the Appellate Courts, finding the Respondents in civil contempt of court and imposing sanctions on the Respondents. After considering the arguments of both parties, prior findings of this Court and prior rulings of the Third Circuit in this case, we conclude that Continental's Motion must be denied for the following reasons.

1 This opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

I. FACTUAL BACKGROUND

On February 23,1986, Eastern Airlines ("Eastern") and its pilots' union, the Air Lines Pilot Association ("ALPA)

ratified a collective bargaining agreement ("the CBA).On February 24, 1986, Texas Air Corporation, the parent of Continental acquired Eastern. ALPA asserted that the acquisition was a merger requiring the integration of the Eastern and Continental pilot seniority lists pursuant to the CBA. When Eastern and Continental refused to bargain, ALPA initiated arbitration.

In March, 1989, Eastern filed bankruptcy and asserted that the automatic stay precluded ALPA from proceeding with the arbitration. The Second Circuit Court of Appeals disagreed and held that the automatic stay did not stay the continuation of the arbitration. In re Ionosphere Clubs, Inc., 922 F.2d 984 (2d Cir. 1990) .Thereafter, ALPA continued the arbitration seeking the integration of the Eastern and Continental pilot seniority lists and back pay.

In December 1990, Continental filed bankruptcy in this Court. ALPA and certain individual Eastern pilots filed protective proofs of claims asserting that, as a result of Continental's acquisition of Eastern, the Eastern pilots were entitled to specific performance of seniority rights granted them under the CBA. Continental objected to these claims and sought a declaration that the claims were general unsecured pre-petition

claims compensable by an award of monetary damages, which were thus dischargeable in bankruptcy. ALPA disagreed and asserted that the pilots were entitled to seniority integration pursuant to the CBA and that only the arbitrator had jurisdiction to determine the appropriate remedy. In February 1993, the Bankruptcy Court sustained Continental's objection to the ALPA claims and classified them as general unsecured obligations.

In April 1993, the Bankruptcy Court entered an order confirming Continental's Plan of Reorganization ("the Confirmation Order"). The Confirmation Order concluded that any claim under the CBA gave rise to a right of payment dischargeable in bankruptcy and that no right to equitable relief was available. Consequently, the Confirmation Order enjoined the arbitration proceeding.

ALPA and the individual Eastern pilots appealed. While the appeal was pending, ALPA entered into a settlement agreement with Continental that was accepted by approximately two-thirds of the Eastern pilots. The pilots who chose not to accept the settlement ("the Remaining Claimants") continued the appeal. Subsequently, the District Court affirmed the Confirmation Order except with respect to the injunction of the arbitration proceeding. In re Continental Airlines, Inc., No. 93-163 (D. Del. Nov. 29, 1995). Both parties appealed to the Third Circuit.

On August 29, 1997, the Third Circuit issued its decision

affirming the District Court. The Court held that the Eastern pilots' claims for seniority integration could be converted into money damages In re Continental Airlines, 125 F.3d 120 (3d Cir. 1997) (Continental I). Consequently, the Court concluded that those claims could be treated and discharged in Continental's Plan of Reorganization. Id. at 135-36.The Court also held, however, that the Bankruptcy Court could not enjoin the arbitration proceeding because Continental had not rejected the CBA in accordance with section 1113. Id. 136-38. A Petition for Writ of Certiorari was denied by the Supreme Court. LLPClaimants v. Continental Airlines, 522 U.S. 1114 (1998).

On October 12, 1999, some of the Remaining Claimants commenced a class action adversary proceeding in

Continental's bankruptcy case ("the Baldridge Class Action"). The Baldridge Class Action sought a determination that the one-year cap in section 502 (b) (7) of the Bankruptcy Code did not apply to their claims under the CBA. By Order dated February 3, 2000, the Baldridge Class Action was certified as a class. Baldridge v. Continental AirlinesL Inc. (In re Continental Airlines, Inc.), Adv. No. 99-412 (Bankr. D. Del. February 3,2000).The Remaining Claimants were permitted to elect whether to pursue their claims in the Baldridge Class Action or in an action previously commenced by the EPMC .Baldridge Stipulation and Order on Motion to Intervene' 3, February 3, 2000).Those who opted out

of the Baldridge Class Action, however, were required to waive their claims against Continental. Id.

In the interim, on October 23, 1998, the EPMC had commenced a lawsuit in the District Court in New Jersey against Continental seeking post-petition enforcement of the CBA ("the New Jersey Action") . Continental filed a motion in this Court seeking an Order enjoining that suit as a violation of the Confirmation Order. We concluded that the Confirmation Order had discharged all claims of the Eastern pilots. In re Continental Airlines, Inc., 236 B.R. 318, 332 (Bankr. D. Del. 1999). We, therefore, held that the Confirmation Order enjoined the New Jersey Action. Id. On appeal, the District Court agreed and held that Continental I precluded any post-confirmation relief even though the CBA survived the bankruptcy process In re Continental Airlines. Inc., 2000 WL 1425751, at *3 (D. Del. Sept. 12, 2000).

On appeal to the Third Circuit, the EPMC asserted that the Eastern pilots had a post-petition right to enforce the CBA because Continental failed to reject the CBA in accordance with the requirements of section 1113 of the

Bankruptcy Code In re Continental Airlines. Inc., 279 F.3d 226, 229 (3d Cir. 2002) (Continental II). The Third Circuit disagreed, stating that Continental I held that any claim based on the award of seniority, whether pre or post-petition, was compensable by money damages. Id. Accordingly, the Third Circuit held that the

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Eastern pilots' claims were barred by its previous decision and the Confirmation Order. Id. at 232.

Concurrently, in the Baldridge Class Action, we concluded that the Eastern pilots' claims were subject to the one-year cap contained in section 502 (b) (7). Ultimately, however, a settlement was reached allowing class members' claims in an amount in excess of the cap.

On or about April 7, 2003, representatives of the Respondents filed a petition with the National Mediation Board ("NMB") seeking to resume arbitration under the CBA. The Respondents consist of two groups of Eastern pilots, the RAG and the EPMC, who did not settle their claims (either through the ALPA settlement or the Baldridge Class Action settlement). On May 16, 2003, counsel to Continental sent correspondence to the NMB asserting that any attempt to accede to the Respondent's request was in direct contravention of the Orders of this Court, the District Court and the Third Circuit. Despite this assertion, the Respondents renewed their request for arbitration, asserting that they had not waived any rights, had not settled any claims and had not had their right to arbitration affected.

II. JURISDICTION

This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334 and § 157 (b) (1), (b) (2)(A), (B), & (0).

III. DISCUSSION

The Motion requires us to interpret the decisions of the Third Circuit in this very case. 2 In rendering our decision, we are bound by the doctrine of law of the case to "implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces". Continental, 236 B.R. at 322 (citing Casey v. planned Parenthood o£Southeastern Pennsylvania, 14 F.3d 848, 857 (3d Cir. 1994).

A. Effect of the Discharge Injunction

Continental asserts that the Respondents violated the Confirmation Order when they sought a resumption of the arbitration proceeding. Although the Third Circuit's decision in COntinental I vacated the Confirmation Order to the extent it prevented arbitration under the CBA, Continental asserts that the Court's ruling left intact all other aspects of the Confirmation Order and that, because of changed circumstances, the Respondents' actions are a violation of the discharge injunction.

We disagree. We conclude that the Respondents' request for arbitration does not violate the Confirmation Order or any other order entered in this case. In Continental I, the Third Circuit upheld the District Court's dissolution of the injunction of

2 In fact, this is the second time that we have been asked to interpret the decision of the Third Circuit on this very issue. Continental, 236 B.R. 318.

arbitration. Continental I, 125 F.3d at 136-37. The Court concluded that section 1113 of the Bankruptcy Code renders

the injunction invalid because Continental failed to reject the CBA. Id. The intent of section 1113 is to preclude debtors from unilaterally terminating a collective bargaining agreement without following its strict mandate. Id. at 137. The Court consequently held that the discharge injunction could not apply to the arbitration because enforcing it would have the effect of permitting Continental to escape its duty to arbitrate under the CBA. Id. The Court specifically rejected Continental's argument that it had no duty to arbitrate and concluded, on the contrary, that Continental was bound to arbitrate. Id. Accordingly, we must follow the law of the case and conclude that the discharge injunction does not enjoin the Respondents' attempt to resume the arbitration under the CBA.

B. Futility of Arbitration

Continental contends that the Respondents' action is improper because they are bound by the settlement in the Baldridge Class Action or are entitled to no relief because they waived their claims. Accordingly, Continental asserts that it should not be forced to arbitrate the Respondents' claims because their attempt to recover from Continental is futile.

The Respondents contend, however, that even if they cannot recover from Continental, the resumption of arbitration is

appropriate because it may serve other purposes.

In particular, they assert that they continue to have a contractual and statutory right to pursue arbitration that may generate a recovery from parties other than continental.

Again, we find that we are bound by the decision of the

Third Circuit in Continental I. In concluding that the right to seniority integration gave rise to monetary damages, the Third Circuit determined that the claims were dischargeable in bankruptcy. Continental I, 125 F.3d at 136. The Third Circuit, however, limited its holding to how the claims would be treated in Continental's bankruptcy. Id. The Court did not determine if an award was warranted, whether an award should be granted or who would be liable should an arbitration award be granted. Id. At the time it upheld the right to arbitrate under the CBA, the Third Circuit knew that any award the arbitrator may enter against Continental was discharged by the Confirmation Order. It nonetheless concluded that the arbitration should be permitted to proceed. The facts are no different now. Thus, we cannot enjoin the arbitration.

In fact, although the Respondents are barred from recovering any award the arbitrator may enter against Continental, simply obtaining that award may be sufficient. As the Third Circuit noted, the process of arbitration itself has a salutary purpose. Hays and Co. V. Merrill Lynch, 885 F.2d 1149, 1158 (3d Cir.

1989). Even a pyrrhic victory may be significant from the personal perspective of the Respondents, who have expended considerable time (almost 13 years), energy and money to prove that Continental and Eastern Airlines wronged them. Further, we cannot discount the precedential effect which any decision may have in future dealings, if any, between the parties and their representatives.

In support of its position that the Respondents lack a basis to pursue arbitration, Continental also relies on the Third Circuit's decision in Continental II. However, in Continental II the Third Circuit was not asked to enjoin the arbitration; rather it was asked to enjoin a law suit. Further, the Third

Circuit concluded that the New Jersey Action was improper because the EPMC was attempting to relitigate an issue previously decided by the Court. Continental II, 279 F.3d at 233. The Court explained that the right to seniority integration, for both pre and post petition conduct, gave rise to a claim dischargeable in bankruptcy. Id. at 231. The Court did not, however, modify its ruling in Continental I that its arbitration could was not be enjoined. Id. at 228. As a result, we conclude that Continental II does not compel us to enjoin the arbitration now sought by the Respondents.

Continental asserts that the arbitration proceeding cannot provide a remedy that will not be contrary to the Confirmation

Order. We disagree. Continental ignores the possibility that the arbitration could impact other parties. The Respondents assert that they may be entitled to a remedy against the Continental pilots or others; they assert that to obtain such an award Continental must be a named party in the arbitration. While the Respondents may not be entitled to a recovery from Continental's estate, this does not preclude any relief in the arbitration. Further, the Baldridge Class Action settlement provided that members who withdrew their claims were entitled to pursue damages and such other relief as may be awarded in any judicial forum or arbitration proceeding. (Baldridge Stipulation and Order on Motion to Intervene _ 5). This reservation of rights, in conjunction with the Third Circuit's holding in Continental I, clearly provides the Respondents with a right to demand arbitration under the CBA and to pursue anyone other than Continental against whom they may have rights.

The Respondents concede that any award that the arbitrator may enter against Continental would be subject to the discharge provided in the Confirmation Order. They have

agreed to this Court's jurisdiction to determine whether enforcement of that remedy would violate any Orders entered in this case. That is sufficient protection to Continental to assure that the Orders of this Court will not be violated. Thus, we conclude that no Order previously entered in this case bars the resumption of

arbitration by the Respondents and, in fact, the Third Circuit decision in Continental I expressly preserved the right of the Respondents to proceed with arbitration. Accordingly, Continental's Motion must be denied.

IV. CONCLUSION

For the reasons set forth above, we deny Continental's Motion seeking an Order to Compel Respondents to Comply with Orders.

An appropriate Order is attached.

BY THE COURT:

Dated: December 17, 2003

s/ Mary F Walrath
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	Case No. 02-83984-SSM
US AIRWAYS GROUP, Inc..)		Chapter 11
	)	(Jointly Administered)
Debtors	)	

MEMORANDUM OPINION

A hearing was held in open court on February 21, February 24, February 28, and March 1, 2003, on the debtors' motion for a determination that they satisfy the financial requirements for a "distress" termination of the retirement income plan for pilots of US Airways, Inc. The motion also seeks approval of the termination, a finding that termination would not violate the terms of the collective bargaining agreement between the debtors and the pilots' union, and approval of a follow-on defined contribution retirement plan for the pilots.

The motion is supported by the Official Committee of Unsecured Creditors but opposed by the Air Line Pilots Association ("ALPA") - the union bargaining representative for the debtors' pilots - as well as by the Retired Pilots Association of US Airways ("the Soaring Eagles"), the Piedmont Silver Eagles, eighteen pilots known as the Lump Sum Eligible Pilots, another group of pilots led by Elwood Menear and Edward Graf, and by approximately 49 *pro se* active and retired pilots, at least one widow of a pilot, and at least one former spouse of a pilot. The Pension Benefit Guaranty Corporation (" PBGC") - which would be responsible for paying insured benefits under the terminated plan - filed a response taking no position on

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whether the plan should be terminated but urging the court to require appropriate proof and to make adequate findings.

At the conclusion of the hearing, the court made findings orally on the record and ruled that the debtors satisfied the requirements for a distress termination and would be allowed to terminate the plan, subject to a determination that doing so would not violate the collective bargaining agreement between the debtors and ALPA. That issue, the court ruled, would have to be resolved under the arbitration mechanism established by the collective bargaining agreement itself. An order reflecting the court's ruling was entered on March 2, 2003. The purpose of this opinion is to supplement the oral findings of fact and to explain in somewhat more detail, particularly for parties who were not present at the hearing, the reasons for the court's ruling.

Findings of Fact and Procedural Background

US Airways is the seventh largest air passenger carrier in the United States, and the largest east of the Mississippi River. Its parent holding company, US Airways Group, Inc., and seven subsidiaries - among them US Airways, Inc., Allegheny Airlines, Inc., Piedmont Airlines, Inc., and PSA Airlines, Inc. 1 - filed voluntary petitions in this court on August 11, 2002, for reorganization under chapter 11 of the Bankruptcy Code. Since that date, they have continued to operate their business as debtors in possession. A joint plan of reorganization has

1 Allegheny, Piedmont, and PSA operate short-haul turboprop aircraft under the name US Airways Express.

2

been proposed and has been submitted to creditors for a vote.

A hearing on plan confirmation is scheduled for March 18, 2003.

The pilots of US Airways are represented by ALPA. US Airways and ALP A are parties to a collective bargaining agreement that became effective on January 1, 1998. The collective bargaining agreement requires US Airways to maintain for its pilots a defined benefit retirement plan with certain specified benefits. The plan has two components - a tax qualified plan and a non-qualified or so-called "Top Hat" plan. By law, pilots are required to retire at age 60. The amount of the pension is calculated based on age, years of service, and final average earnings. Pilots who retire at age 60 may elect a lump-sum payment. There is also an option for joint and survivor benefits.

As a result of financial distress that predated, but was exacerbated by, the terrorist attacks of September 11, 2001 (" 9/11"), US Airways brought in new management in March 2002 and began efforts to restructure its operations. As part of that effort, it negotiated with its unions, including ALPA, for wage and other concessions that would make the airline more competitive. An agreement was reached with ALP A ("the first-round concessions") approximately a month prior to the chapter 11 filing. None of these concessions modified the terms of the pilots' pension plan, although the salary reductions did have the incidental effect of somewhat reducing the future obligations under the plan. As part of the agreement, the debtor agreed, if it were to file for chapter 11, not to seek relief from the collective bargaining agreement under §§ 1113 or 1114, Bankruptcy Code.

Prior to the chapter 11 filing, US Airways submitted an application to the Air Transportation Stabilization Board ("ATSB") for a $900 million guarantee with respect to a

proposed $1 billion loan. This approval was based on a 7-

year business plan which required the debtor to achieve certain targeted reductions in operating costs. Tentative approval of the guarantee was given prior to the chapter 11 filing. Although US Airways had initially hoped to effect its restructuring outside of chapter 11, it ultimately determined that it could not reach all necessary agreements without filing for chapter 11, which, as noted, occurred on August 11, 2002.

Since the outset of the case, the debtors have aggressively pursued a "fast track" reorganization, with the announced goal of being out of chapter 11 by the end of first-quarter 2003. They achieved substantial "first-round" concessions from those unions with which they had not reached agreement prior to the chapter 11 filing, have saved large sums by abandoning unneeded aircraft, and have negotiated substantial reductions in payments on aircraft they have kept. To maintain cash liquidity during the reorganization process, the debtors, with court approval, entered into a $500 million post-petition credit facility ("the DIP loan") with the Retirement Systems of Alabama ("RSA"). Of this amount $300 million has already been drawn down. RSA is also the "plan sponsor" under an agreement whereby it will invest $240 million at confirmation in exchange for a 37% interest in the reorganized debtors. Finally, RSA has agreed to loan $75 million of the non-guaranteed (or "at risk") portion of the $1 billion A TSB loan. Despite the debtors' efforts, the path to profitability and emergence from chapter 11 has not been smooth. In particular, in the October to November 2002 time frame, two serious problems surfaced that threatened the debtor's business plan, which in turn was the foundation for the A TSB loan guarantee and a predicate for the RSA investment. The first was a dramatic

shortfall in revenue, as airline passenger revenues throughout the industry remained substantially below pre-9/ 11 levels. As a result, the revised revenue projections for 2003 – the year of the planned emergence from chapter 11 - were $997 million below the original projections. Coupled with an additional increase of $51 million in fuel costs, this left the debtors with a projected pre-tax loss for 2003 of over $800 million instead of the modest $122 million profit that was projected in the business plan.

The second problem that emerged was a serious funding shortfall for the debtors' defined benefit pension plan over the 7 -year period of the business plan. The debtor maintained four defined benefit plans, among them the ALP A plan. Two factors conspired to create the funding shortfall. First, protracted poor performance by the stock market had resulted in a significant decline in the value of the plan assets. Second, the decline in long term interest rates to a 40-year historic low had increased the amount of the current liabilities for the plans, since current liabilities are determined based on the cost of an annuity to pay the specified benefit, and that cost, in turn, rises as long-term interest rates fall.

The debtors responded to the revenue shortfall by seeking additional savings from its labor force, its aircraft lenders and lessors, and its vendors. The negotiations with its unions, including ALPA, for a "second-round" of concessions took place in early December 2002, as the debtors struggled to meet their goal of filing a plan of reorganization by December 20, 2002. The concessions by ALP A - which was the only labor group to agree to the full amount requested by the company - totaled $179 million, of which $101 million represented primarily work-rule changes and wage reductions, and $78 million represented modifications

to the accrual formula for the pension plan. The concessions were embodied in two documents referred to as Letter of Agreement ("LOA") 83 and LOA 84.

At the time these negotiations were taking place, the debtors were also attempting to find a solution for the funding shortfall in its defined benefit retirement plans. As projected by the plans' actuaries, the required contributions over the seven years of the ATSB loan and the business plan were as follows:

Year	All 4 Plans	Pilots Plan
2003	$51 million	$51 million
2004	$753 million	$525 million
2005	$538 million	$337 million
2006	$425 million	$275 million
2007	$346 million	$222 million
2008	$246 million	$74 million
Total	$2.453 Billion	$1.659 billion

One solution investigated by the debtors involved "restoration funding," under which, as the debtors viewed the law, the PBGC could approve a 30-year amortization of the funding shortfall. For the pilots' plan, restoration funding would require the debtor to pay approximately $122 million per year, or $854 million over the seven years of the business plan, instead of the $1. 659 billion that would be required without such relief. The other solution contemplated waivers by the Internal Revenue Service ("IRS") of the funding

contributions that would have been required in 2004 and subsequent years. Looming over all

of this was the realization that the PBGC could involuntarily terminate the plans because of their under - funded state.

As a condition of agreeing to the second round of concessions, the ALP A negotiating committee demanded a letter from US Airways to ensure that, if the pension plan were terminated, US Airways would not simply pocket the money it was otherwise obligated to pay into the plan. This letter ("the side letter"), which is undated - and for that matter, unsigned was delivered to the negotiating committee on December 13, 2003. It stated in relevant part:

"If the PBGC and the IRS reject the Company's request for long-tern funding relief and this results in termination of the plan, the freezing of the plan or significant modification in Plan benefits from those negotiated in the 2002 Supplementary Cost Reduction Agreement (" Agency Action"), the parties agree to meet and confer for the purpose of negotiating alternate pilot retirement benefits.

If the Plan is terminated, the alternate pilot retirement plan shall provide benefits from and after the effective date of the termination that resemble, in the aggregate, the benefits pilots would have earned... absent the termination. "

The letter limited the company's commitment with respect to the follow-up plan by stating that such a plan "may" take the form of a defined contribution plan and that the company's "cash cost... may in no event exceed [the] restoration funding cost in any year." The cost that the debtors had projected in their business plan for restoration funding of the pilots pension plan was $122 million per year. The chairman of the

ALP A negotiating committee testified that the reference in the side letter to plan "termination" was intended to address the possibility of an involuntary termination by the PBGC and was not intended by ALP A as consent for the debtors to initiate a distress termination. Indeed, ALP A has filed a grievance under the

collective bargaining agreement asserting that the debtors' notice of intent to terminate the plan violates the terms of the agreement.

By its terms, the side letter was to be kept confidential until" Agency Action" had occurred. The debtors and representatives from ALP A had met with the PBGC on November 22, 2002, to discuss the restoration funding approach. Around December 11, 2002, the debtors received a copy of a legal memorandum from PBGC's general counsel opining that restoration funding could not be approved. The debtors then submitted a legal memorandum to the PBGC taking issue with that analysis. The debtors and representatives of ALP A met with the IRS on December 13, 2002, but received no encouragement that a waiver solution would be available. Finally, the debtors and ALP A approached friendly senators from states in which US Airways had a presence and managed to have a bill introduced in Congress that would have provided US Airways with funding relief equivalent to what it would have achieved from restoration funding. That legislation was defeated in committee on January 9, 2003. A hearing was held on January 14, 2003, at which representatives of ALP A and the debtor testified in favor of a legislative solution. However, an attempt on the Senate floor to incorporate the

relief as an amendment to a continuing resolution was defeated on January 22, 2003. Eight days later - January 30, 2003 - the debtors gave the PBGC and the ALPA plan participants 60 days notice that the debtors intended to terminate the pilots defined benefit plan on March 31, 2003.

Simultaneously with the giving of the notice, the debtors filed the present motion and noticed it for hearing on February 20, 2003. Because of other matters being heard that day, the hearing - which extended over a period of four full days - did not commence until

February 21, 2003. At the hearing, the debtors presented evidence that their business plan which is the basis of the ATSB loan guarantee approval and a predicate for the RSA investment - is based on "an assumed 30-year amortization of unfunded pension liability." For the pilots' plan, such restoration funding would cost the company approximately $805 million less over the seven years of the business plan than the projected funding requirement in the absence of restoration funding. Relevant features of the business plan may be summarized as follows:

Year	2003	2004	2005	2006	2007	2008	2009
Revenue	$7,133	$8,112	$8,702	$9,193	$9,414	$9,501	$9,586
Pre-tax Income	$ (229)	$ 122	$ 363	$ 571	$ 625	$ 593	$ 587
Ending cash	$1,04	$1,288	$1,647	$1,894	$2,042	$1,994	$1,920

The debtor's chief financial officer testified that within the airline industry, cash reserves equal to approximately 20% of revenues would be necessary for the debtor to be viewed as financially healthy, and that absent appropriate levels of cash, the company could not obtain the financing necessary

to implement its long-term business strategy of shifting to the use of regional jets on routes that are currently unprofitable. He further testified that in the absence either of restoration funding or the ability to terminate the pilots' pension plan the additional amounts due in 2004 and 2005 to maintain the current plan would reduce the debtor's projected cash below acceptable levels. As noted, the required contributions for those two years, as calculated by the plan's actuaries, would total $862 million, or approximately $618 million more than the amount that would be required under the $122 million a year for restoration funding. The debtors' financial advisor testified that without a "resolution" of the

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2 Figures are in millions of dollars.

pension funding issue that will enable the reorganized debtors to meet the projections in their business plan, the ATSB is unlikely to issue its guarantee and RSA is unlikely to make its investment. Indeed, the A TSB, in a letter dated February 11, 2003, while approving the $900 million guarantee (based on a finding that the debtor's revised business plan was financially sound and presented a reasonable assurance of repayment of the proposed loan) made its approval subject to a number of conditions, among them that "[a] resolution of the Applicant's pending funding issue must be approved by the PBCG and, if necessary, the Bankruptcy Court." The letter goes on to state:

" The Board understands that discussions involving the applicant's pension initiative are ongoing among the Applicant and other interested parties. The Board takes no position on the form or specific provisions of such a resolution."

The debtors' business plan is dependent upon the $1.240 billion in exit financing represented by the ASTB guarantee and the RSA investment. The debtors have explored other sources of exit financing but have been unable to identify any other lender or investor willing to provide the cash needed for the debtor to emerge from chapter 11.

Consistent with the commitment in the side-letter to establish a follow-up pension plan, the debtors have proposed, subject to negotiations with ALP A as to the final terms, a defined contribution retirement plan for the active pilots. This plan would provide no benefits to pilots already retired. The preliminary design by the debtors embodies individualized contribution levels based on the number of years each pilot has remaining before reaching retirement age. Those with fewer years remaining would receive significantly higher contributions - in a few cases up to 50% of their pay - in an effort to build up the account to the point where the

retirement benefit, coupled with what the pilot would receive from the PBGC would approach what the pilot would have received under the defined benefit plan.

The maximum insured benefit currently being paid by the PBGC for a person retiring at age 60 - the mandatory retirement age for pilots - is $28,614.00 per year. Depending on when they first became eligible to retire, however, some pilots could receive more, since funds in a terminated retirement plan are used first to pay benefits to "Class 3" participants. The debtors' actuary estimated that the plan was

sufficiently funded to pay approximately 90% of the contractual benefit to Class 3 participants. However, individual cases - as reflected on an exhibit introduced at the hearing - appeared to vary widely, with the projected payments for many of the retired pilots being in the range of one-third to one-half of the amount they would receive under the plan. In one case, for example, a retiree due to receive $211,871 annually would receive only $68,775. Retirees not falling within Class 3 would receive only the insured amount. For a number of the active pilots, even the additional benefit from the proposed follow-on plan would result in a projected benefit of approximately 50% of the benefit that would be paid under the current plan, and even then, only if the follow-on plan achieves the projected 8% rate of return.

A considerable amount of testimony, both on direct and cross-examination, concerned the assumptions utilized by the plan's actuary, as well as the savings that could be achieved if various alternative strategies were pursued. One major issue was the proper discount rate to be used for evaluating plan liabilities for years after 2003. The plan's actuary assumed that certain short-term relief enacted by Congress for years 2002 and 2003 would not be extended when the legislation sunsets at the end of 2003. The relief centers on the discount rate used to

calculate future liabilities. As noted, the lower that rate, the higher the liability. The discount rate in effect before the current relief was 105% of the 4-year weighted average for 30-year Treasury notes, the yields for which are now at a historic low. Thirty-year Treasury notes are no longer being

issued, but apparently the IRS calculates a surrogate for that rate based on yields of existing notes. Under the current relief legislation, the discount rate for current liabilities is calculated at 120% rather than 105% of the 4-year weighted average for 30-year Treasury notes. This has the effect - because it increases the discount rate - of reducing current liabilities, and thus the required contributions the debtors would have to be met. The debtor's actuary testified that he prepared analyses showing the funding contributions that would be required both if legislation were enacted extending the current relief through the seven years of the business plan and if it were not. The debtor's management determined to adopt the more conservative assumption. One of the actuaries testifying as an expert for the retirees stated that he would advise a client of the results under both scenarios and let the client decide which to adopt. The other actuary who testified for the retirees stated that he was certain - and, indeed, could" guarantee" - that Congress would enact legislation extending the 120% standard, or something like it, through the out years of the debtor's business plan. The actuaries differed on the actual effect if the current legislation were extended through the remaining years of the business plan. The two actuaries based their calculations on rules of thumb and rough estimates, while the plan's actuary based his on the actual computer model used for administration of the plan. For that reason, the court finds the calculations of the plan's actuaries more credible. Extension of the current funding relief would result a savings of $115. 9 million in the amount due over the seven years of the

business plan as compared with the amounts due if the current relief expires on its sunset date: 3

Year	2003	2004	2005	2006	2007
Reversion	$25.5	$532	$331.6	$268.7	$216
Extension	25.5	448.5	259.5	254	220
Savings	-	83.5	72.1	14.7	(4.0)

Year	2008	2009	Total
Reversion	$169.5	$68.5	$1,611.8
Extension	$175.8	$112.6	$1,495.9
Savings	$(6.3)	$(44.1)	$115.9

Other issues explored on examination and cross-examination of the actuaries concerned the financial effect of "freezing" the pilots plan, freezing all of the defined benefit plans, and freezing all of the retirement plans (both defined benefit and defined contribution); of retroactively reducing benefits under the various plans; and of splitting the pilots' plan into two plans, one for the retirees and one for the active pilots. Estimates of the amount that could be saved by various combinations of these approaches ranged up to $1.5 billion dollars. The proportion of the pilots' plan that represents obligations owed the retirees, as opposed to the active duty pilots, was estimated to be approximately 25%.

The First Amended Joint Plan of Reorganization filed by the debtors incorporates the revised business plan that was provided to the ATSB in support of the application for the loan guarantee. Under the plan, existing shareholder interests are cancelled, and shareholders receive nothing on account of their equity interest. Unsecured creditors will receive newly issued stock having an estimated value equal to less than two cents on the dollar. A large block of stock will go to the RSA in exchange for its $240 million investment. Other shares will be issued to the various labor groups in exchange for their wage concessions. The plan's

3 Figures are in millions of dollars and reflect only the tax-qualified component of the pilots' plan.

financial projections are based on the RSA investment as well as the $1 billion loan ($900 million guaranteed by the ATSB and $100 million "at risk) to be made at confirmation.

Conclusions of Law and Discussion

A.

This court has subject-matter jurisdiction under 28 U.S.C. §§ 1334 and 157(a) and the general order of reference from the United States District Court for the Eastern District of Virginia dated August 15, 1984. Under 28 U.S.C. § 1 57(b)(2)(A), this is a core proceeding in which a final order may be entered by a bankruptcy judge. Proper notice of the motion and of the hearing were given to the PBGC, ALPA, and all beneficiaries of the pilots' plan. Vigorous objection was raised by many of the objecting parties that 20 days notice, even if technically sufficient under the Federal Rules of Bankruptcy Procedure and the case management order entered in this case, was wholly inadequate as a practical matter, given the complexity of the financial issues. The court was not unsympathetic to that argument but concluded that the circumstances simply did not permit the hearing to be put off and required that the motion be promptly decided. In any event, the record reflects that the objecting parties, notwithstanding their limited opportunity to prepare, were fully able to develop the record and present their cases.

B.

The pilots retirement plan is subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), which, among other things, establishes certain funding standards for defined benefit plans and provides an insurance program under which the PBGC will

administer an underfunded pension plan that is terminated. Termination of such a plan by the

employer is governed by 29 U. S. C. § 1341, which addresses both a "standard" termination and a "distress" termination. It is the latter which the debtors' seek to accomplish.

In order to effect a distress termination, the plan administrator must give the PBGC and each affected party at least 60 days written notice of intent to terminate setting forth the proposed termination date. 29 U. S.C. § 1341(a)(2). Additionally, the termination must not violate the terms and conditions of an existing collective bargaining agreement. 29 U. S.C § 1341(a)(3). For a chapter 11 debtor, the standards for a distress termination require that four condition be met:

> 1. As of the proposed termination date, the employer has filed, or has had filed against it, a petition for reorganization under the Bankruptcy Code;
>
> 2. The case has not, as of the proposed termination date, been dismissed;
>
> 3. The employer has provided the PBGC any request for Bankruptcy Court approval of the termination; and

> 4. The bankruptcy court determines that, unless the plan is terminated, the employer will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and the court approves the termination.

29 U. S. C.. § 1341(c)(2)(B)(ii)(I) - (IV). The statute requires the debtor to make a showing that it will be unable to pay all of its debts under a plan of reorganization and will be unable to continue in business outside of bankruptcy. *In re Wire Rope Corp. of America, Inc.,* 287 B.R. 771,777 (Bankr. W.D. Mo. 2002). The purpose of the statute

is to limit "to cases of severe business hardship" the ability of plan sponsors to terminate their pension plans and thereby shift liability for guaranteed benefits onto other insurance premium payers in the PBGC program.

!d. The reference in the statute to "a" plan of reorganization does not permit a distress termination simply because a particular plan requires it; rather the test is whether the debtor can obtain confirmation of *any* plan of reorganization without termination of the retirement plan. 287 B.R. at 777-78. The burden of proof for a distress termination is on the sponsor of the plan. 287 B.R. at 777.

The debtors assert that, absent termination of the plan, they will be unable to obtain confirmation of the reorganization plan they have proposed. They also assert that the December 13, 2002, side letter constituted an assent by ALP A to a distress termination if pension funding relief could not be obtained from the PBGC and ALP A, and they seek a ruling that a distress termination would not violate the

collective bargaining agreement. Finally, they seek authority to enter into a follow-on defined contribution plan for the pilots on terms consistent with those set forth in the side letter.

The objecting parties contend that the debtors have simply not made an adequate showing that reasonable alternatives to plan termination have been properly considered or explored. They also dispute that the funding shortfall is as great or as unmanageable as the debtors have portrayed. They argue that plan termination would have a devastating effect on the pilots in general, especially on the retirees (who would receive no benefits from the follow on plan), and is highly unfair given that only the pilots' plan would be terminated, while all the remaining employee groups would keep their current pension benefits. Finally, they argue

that ALP A never consented to a distress termination of the plan; that termination would violate the collective bargaining agreement; that in any event under the Railway Labor Act this court has no jurisdiction to make that determination; and that the court should not even consider approving the termination until the pending grievances are resolved.

C.

The pivotal issue to be resolved by the court is whether the financial requirements for a distress termination have been met. As the court observed in ruling from the bench, the very fact that this issue is before the court is disheartening, to say the least. At the outset of this chapter 11 case, the

debtors announced that they intended to pursue a "labor-friendly" reorganization. There is no dispute that the pilots have already given up more in pay and benefits than any other employee group. This is true not only in gross dollar terms but also as a percentage of the targets that each group was asked to give. Under the present motion, the only pension plan that would be terminated is the pilots' defined benefit plan. It is not surprising, therefore, that the pilots, whether active or retired, feel a particularly keen sense of having been shabbily treated.

The problem, however, is simply the magnitude of the funding obligation for the pilots' plan, which dwarfs that of the other plans. As noted, the funding requirement for the pilots' plan over the seven years of the business plan is fully two-thirds of the amount for all four of the company's defined benefit plans (one of which has been "frozen" since 1991) combined. In simple dollar terms, terminating any of the other defined benefit plans would not solve the cash flow obstacles to the debtors' reorganization.

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The statutory test, as noted, is whether "unless the plan is terminated, the employer will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S. C. § 1341(c)(2)(B)(ii)(N). The only plan of reorganization that has been identified as being in any sense realistic is the plan proposed by the debtor and approved by the A TSB. It "pays" unsecured creditors only in stock having an estimated value of less than two cents on the dollar. The Official Committee of Unsecured Creditors has

nevertheless recommended acceptance of the plan. Even this marginal payout is wholly dependent upon the debtors' obtaining the $1.240 billion in exit financing represented by the $1 billion ATSB-guaranteed loan and the $240 million RSA investment. The testimony of the debtors' financial advisor is that without a "resolution" of the pension funding issue that will enable the reorganized debtors to meet the projections in their business plan, the A TSB is unlikely to issue its guarantee and RSA is unlikely to make its investment. The debtors have explored other sources of exit financing and but have been unable to identify any other lender or investor willing to provide the cash needed for the debtor to emerge from chapter 11. Indeed, without the ability to draw down on the remaining $200 million in DIP financing, it is questionable whether the debtor can continue to operate in chapter 11. No "resolution" of the pension funding issue has been identified by the debtors other than restoration funding or termination of the pilots' plan. Restoration funding is wholly dependent upon Congress enacting legislation to provide such relief, and no such legislation is currently pending. That leaves only termination.

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The objecting parties assert, however, that there are other solutions, or at least potential solutions, which the debtors have failed adequately to explore. These include "freezing" the pilots' plan, splitting the pilots' plan into separate plans for retirees and active pilots, freezing the company's other pension plans, and retroactively reducing the benefits under the company's other pension plans. Based on the evidence presented at the hearing, however, the court was not convinced that any of these alternatives were realistic, especially given that modifications to the various plans,

whether defined benefit or defined contribution, for the debtor's other labor groups would require either the agreement of the unions involved or the rejection of the collective bargaining agreements with those unions. As reflected by the debtors' limited success in obtaining second-round concessions from the unions other than ALP A, the likelihood that, for example, the mechanics and the flight attendants - whose pay and pensions are far below that of the pilots - would agree to a freezing or retroactive reduction in their pension benefits so as to preserve the pilots' benefits verges on fantasy. Moreover, time is running out. It was testified that the debtors' agreement with their Visa/Mastercard credit card processor expires March 31, 2003, and apparently will not be extended in any event beyond May 1, 2003. Approximately have the debtors' ticket revenues come from credit card sales. Although the debtors have negotiated with other credit card processors to take the existing processor's place, those processors have stated that emergence from chapter 11 is a condition of entering into any agreement.

The court determines, therefore, that the debtors have carried their burden of showing that, unless the pilots pension plan is terminated, the debtors will not be able to pay their debts under a plan of reorganization and will not be able to continue in business outside the chapter

11 reorganization process. Only one realistic plan of reorganization has been proposed. It is dependent on the $1.240 billion in exit financing represented by the ATSB $900 million loan guarantee, the associated $100 million in

"at risk" loans, and the RSA $240 million capital contribution. Those in turn are dependent on the debtor's ability - and more precisely on ATSB's and RSA's comfort that the debtors have the ability - to meet in each year the levels of profitability reflected in the seven-year business plan. No other source of exit financing has been identified, and without the A TSB guarantee and the RSA investment, there is no apparent way the debtor will be able to emerge from chapter 11 and avoid liquidating under chapter 7.

D.

The next issue is whether the court should "approve" the termination. No reported case appears to have discussed what showing, if any, must be made for approval beyond a finding that the debtor meets the financial requirements set forth in the statute. The court nevertheless will assume that the court, in deciding whether to approve a distress termination, may consider other equities in the case.

As will be discussed, there remains an issue of whether termination of the pilots' pension plan would violate the terms of the collective bargaining agreement between ALPA and the debtors. However, again for reasons that will be discussed, this court does not have jurisdiction to decide that issue. Accordingly any approval by this court is necessarily subject to a separate determination that termination will not violate the collective bargaining agreement.

The remaining argument is that termination of the pension plan result in serious financial hardship to many, and perhaps most, of the active and retired pilots and their

families. From the evidence presented as well as the numerous letters the court has received, it is obvious that many individuals will indeed suffer great financial hardship. But the question always remains: what is the alternative? If the debtors are unable to reorganize and must liquidate in chapter 7, the pension plan would be terminated anyway, and the retired pilots would be in exactly the same position, as regards their pension, as they will under the proposed distress termination. The position of the active pilots would be significantly worse under a liquidation, because they would also lose their current employment and whatever benefits might accrue under a follow-on plan. Given that reality, the undoubted financial hardship that will result from a termination of the plan is an insufficient basis for this court to withhold its approval when the debtors have made a compelling showing that termination is necessary for this airline to emerge from chapter 11.

E.

The final issue is whether a distress termination of the plan would violate the collective bargaining agreement between the debtors and ALP A. There is no dispute that the maintenance of the plan is required by the collective bargaining agreement, which has not been rejected and indeed which the chapter 11 plan proposes to assume. The debtors, however, contend that the December 13, 2002, side letter which was demanded by ALP A as a condition of agreeing to the second-round of concessions constitutes ALP A's consent to a distress termination if the debtors and ALP A were unsuccessful in obtaining funding relief from the PBGC or the IRS. ALP A, on the other hand, asserts that it never agreed to such a termination by the debtors but simply recognized that the PBGC was not bound by the collective bargaining agreement and had the power to step in and

terminate the plan. The purpose of the

letter, according to ALPA's evidence, was simply to provide a measure of protection in the event the PBGC acted on its own initiative.

The language in the side letter could fairly be characterized as equivocal. It begins, "If the PBGC and the IRS reject the Company's request for long-term funding relief *and this results* in termination of the plan. . . ." (Emphasis added). Standing alone, the term "termination" might refer either to a distress termination or an involuntary termination. At the same time, the phrase" and this results" strongly tends to suggest outside action rather than action by the company. It is true that some of the testimony given by the president of ALPA at the Congressional hearing in January 2003 could be interpreted as acknowledging the debtors' right to initiate a distress termination if agency or legislative relief were not obtained. Balanced against this, however, is the testimony of the head of the pilots negotiating committee that the side letter was not intended to allow the debtors, as opposed to the PBGC, to terminate the plan without ALPA's approval. Indeed, given that ALPA had already, as part of the second round of concessions, agreed to very specific changes in the pension plan, it would seem strange that the union would, in a side agreement, essentially give the debtor carte blanche to go ahead and terminate the plan. In any event, having considered the evidence, the court can only conclude that reasonable finders of fact could reach differing conclusions as to the meaning of the side letter, and, specifically, as to whether it authorized the debtors to proceed with a distress termination of the plan.

It is precisely because reasonable persons could disagree as to the interpretation of the side letter that the court declines to reach that issue. As ALPA persuasively argues, the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, which also governs collective bargaining

agreements in the airline industry, *see* 45 U. S. C. § 181, divests federal courts of jurisdiction over so-called "minor" disputes as to the interpretation and application of collective bargaining agreements, 4 which instead must be determined by boards of adjustment established under the agreement itself. 45 U. S.C. § 184; *United Transp. Union* v. *South Carolina Pub. Ry.Comm 'n,* 130 F.3d 627 (4th Cir. 1997) (citing *Consolidated Rail Corp.* v. *Railway Labor Executives Ass'n.,* 491 u.S. 299, 109 S.Ct. 2477, 105 LEd.2d 250 (1989)); *Air Line Pilots Ass'n, Intern.* v. *Northwest Airlines, Inc.,* 627 F.2d 272 (D.c. Cir. 1980) (district court lacked subject matter jurisdiction over dispute between airline and union as to alleged violation of collectively bargained pension plan). This is true even as to an airline in bankruptcy. *In re Continental Airlines,* 125 F.3d 120, 129 (3rd Cir. 1997) (role of federal court is to protect the jurisdiction of the arbitral board; court cannot inquire into the merits of the underlying dispute under the collective bargaining agreement); *see also In re Ionosphere Clubs, Inc.,* 922 F. 2d 984 (2d Cir. 1990) (debtor is bound by the arbitration provisions of the collective bargaining agreement until the agreement is rejected under § 1113, Bankruptcy Code).

Here, there is no dispute that a system board of adjustment has been established under the collective bargaining agreement between the debtor and ALP A to

resolve disputes under the agreement. The court will assume that it has discretion, in matters falling within its "core" jurisdiction, to determine whether to stay its own proceedings in favor of arbitration.

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4 As the Fourth Circuit has explained, "minor" disputes under the Railway Labor Act "involve 'either... the meaning or proper application of a particular provision [of a collective agreement] with reference to a specific situation or to an omitted case.. . . ", *Dement* v. *Richmond, Fredericksburg & Potomac R.R. Co.,* 845 F.2d 451,462 (4th Cir. 1988) *(citing Elgin, J & E. Ry. Co.* v. *Burley,* 325 U.S. 711, 65 S.Ct. 1282, 89 LEd. 1886 (1945)).

Gandy v. *Gandy (In re Gandy),* 299 F. 3d 489, 495 (5th Cir. 2002); *In re U.* S. *Lines, Inc.,* 197 F.3d 631, 640 (2nd Cir. 1999). However, in a case in which a fair argument can be made for each party's interpretation of the agreement, the court concludes that the firm and long standing policy under the Railway Labor Act of deferring to the arbitration mechanisms established by the Act precludes this court from reaching the merits of the dispute. For that reason, the court declines to make a finding, as the debtors have requested, that a distress termination would not violate the terms of the collective bargaining agreement. Any such ruling must be made by the System Board of Adjustment established under the collective bargaining agreement.

F.

One final matter requires only brief discussion. ALP A and several of the individual objectors assert that the debtors are attempting to have this court "impose" a particular form of defined contribution plan upon the pilots. The debtors have disclaimed any intent to have this court decree the details of a follow-up plan (assuming the present plan is terminated) or to impose it on the pilots. The debtors say they simply seek authorization from the court to enter into a follow-up plan on such terms, consistent with the December 13, 2002, side letter, as may be negotiated with ALPA. That is the court's understanding of the motion as well. Granting the debtors authority to enter into a defined contribution plan for the pilots does not compel the pilots to accept any particular form of plan and does not allow the debtor to impose particular plan terms on the pilots. It simply eliminates the need for the debtor to return to this court for approval of a follow-up plan provided the plan does not cost more than the debtor would have paid under a restoration funding approach (and is already accounted for in

the financial projections supporting the plan of reorganization) and provided the plan is otherwise non-objectionable to the IRS and the PBGC.

Conclusion

In summary, the court finds that the financial requirements for a distress termination have been met, and the court has approved such termination provided the

termination does not violate the terms of the collective bargaining agreement between the debtors and ALP A. The court declines to make a ruling on that issue, and that dispute will have to be resolved under the arbitration mechanism established by the collective bargaining agreement pursuant to the Railway Labor Act. The court further concludes that the debtors should be allowed, if the existing pension plan is terminated, to enter into a follow-on defined contribution plan upon such terms as may be negotiated with ALP A without having to return to this court provided the cost of the plan does not exceed the amount the debtor would have paid under a restoration funding approach.

An order has previously been entered consistent with this opinion.

Date: March 7, 2003

s/ Stephen S. Mitchell
United States Bankruptcy Judge

Alexandria, Virginia

U.S. Supreme Court

PROTECTIVE COMMITTEE v. ANDERSON, 390 U.S. 414 (1968)

390 U.S. 414

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. v. ANDERSON, TRUSTEE IN BANKRUPTCY, ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. No. 38.

Argued November 7-8, 1967.
Decided March 25, 1968.

TMT Trailer Ferry, Inc. (TMT), the debtor in this protracted reorganization proceeding, was incorporated in 1954, and engages in transporting loaded truck trailers and other freight between Florida and Puerto Rico on sea-going barges. TMT incurred substantial debts and losses from the unsuccessful conversion of a Navy LSD by a drydock and repair company (M-S). Between 1954 and 1957 TMT issued more than 4,000,000 shares of common stock, many of which were acquired by insiders at low prices and disposed of to the public in alleged violation of the Securities Act of 1933 at relatively high prices. As a result of these and other transactions TMT became unable to meet its obligations and a reorganization proceeding was started by an involuntary petition filed against TMT in June 1957. In 1959 the District Court, solely on the basis of documents and records and without a hearing, declared TMT insolvent. It held that the original stockholders had no further interest in the reorganized company, and confirmed a reorganization plan which would have given control of TMT to the holders of preferred ship mortgages on TMT's vessels (the "Caplan mortgage") even though the District Court had questioned, and the trustee (respondent Anderson) had objected to, the

validity of the claims. A successor trustee thereafter petitioned in effect that the order confirming the plan be vacated because of an allegedly illegal agreement between the Caplan mortgage holders and M-S. The petitioner Committee appealed, objecting to the trial court's failure to make an investigation and to conduct a hearing on insolvency. The SEC then petitioned the trial court to investigate its claims that the plan was unfair. The parties agreed on an investigation, which respondent Anderson as reinstated trustee conducted. Anderson's investigation concluded that TMT's business had been "wrecked by gross mismanagement" and "unsound expansion," that TMT [390 U.S. 414, 415] had substantial causes of action against the principal Caplan mortgage holders for diverting corporate opportunities through flagrant abuse of their control and inside positions, and that the mortgage was "a fraudulent transfer not given for fair consideration." Thereafter the trial court vacated its order confirming the 1959 plan and the Court of Appeals affirmed. After the trial court set aside the 1959 plan, no hearings were held on the trustee's and the SEC's objections to the Caplan mortgage claim. The mortgage was not set aside as a fraudulent transfer, nor was it decided to use the claims against the Caplan mortgage holders as setoffs. The SEC, which contended after its own investigation that there were grounds for disallowing the M-S claims, filed detailed specifications of its objections to those claims based upon M-S' alleged negligence and other factors. The SEC and trustee sought reference of the M-S claims to a master but later the trustee moved for the allowance of the claims on the ground that there was only a "remote" possibility of materially reducing them. Despite his own doubts, and without further investigation, the trial judge ultimately confirmed the M-S claims in full as unsecured claims. In 1962 two new reorganization plans were proposed: the "internal plan," recommended by Anderson, involving issuance of new common stock to creditors and "compromises" of (1) the Caplan mortgage whereby the

mortgage holders were to receive in cash what they had put up for the mortgage, plus interest on the principal from the original due date, and (2) the M-S claims whereby they were also allowed in their full amount as unsecured claims, under an arrangement whereby M-S would receive 40% of the reorganized company's common stock; and the "cash plan" involving similar "compromises" and selling the debtor's assets for cash to persons unconnected with the company, the cash to be distributed to creditors. The Committee and the SEC objected, inter alia, that TMT's stockholders were excluded from both plans. Following valuation hearings which did not include full testimony about the company's future prospects, the District Court concluded that its going-concern value, based on current earnings, was $2,780,000. Since creditors' claims were almost twice that much, the court found the debtor to be insolvent and excluded TMT's stockholders from participation in the reorganized company. The District Court approved both plans, observing in connection with "compromising" the Caplan mortgage and M-S claims that successful litigation against the claimants "would take possibly years to conclude" and holding the compromises [390 U.S. 414, 416] "fair and equitable" under the circumstances. A majority of all classes of creditors accepted the internal plan, which that court confirmed in February 1963. The Court of Appeals remanded the case to the District Court to determine the feasibility of the plan if the Government's nontax claims were given priority, which it held was required. The District Court, after hearings, approved the plan as amended to include an immediate cash payment to the Government and assumed that the Court of Appeals had in effect affirmed its other orders and, refusing to reconsider the Committee's and SEC's contentions with regard to the Caplan mortgage and M-S claims, affirmed the plan, which the creditors had accepted. The Committee again appealed. The Court of Appeals ruled that its earlier decision left open all issues not previously discussed or decided but, finding no abuse of

discretion or clear error, refused to remand the case and affirmed all judgments and orders of the District Court, stating that "[t]his . . . litigation must at long last be brought to an end." Dealing with the District Court's approval of the compromises in five sentences, the Court of Appeals noted that "not a single creditor has ever complained of either compromise." Held:

> 1. The Court of Appeals erred in affirming the District Court's approval of compromises involving substantial recognition of the claims against the debtor filed by the Caplan group and M-S in view of the inadequacy of the record for assessing the fairness of the proposed compromises. Pp. 424-441.
> (a) A bankruptcy judge has the duty of determining that a proposed compromise forming part of a reorganization plan is fair and equitable; he must ascertain all facts necessary to determine the probabilities of success should claims be litigated. P. 424.
> (b) The record here provides a reviewing court with no basis for distinguishing between well-reasoned conclusions of the trial court and mere conclusory language unsupported by evaluation of the facts or analysis of law. P. 434.
> (c) An unfair reorganization plan may not be approved by a bankruptcy court even though the vast majority of creditors have approved it. P. 435.
> (d) Approval of compromises is more questionable when the available facts indicate the inadvisability of compromise than when there are no facts pointing either way. P. 436.
> (e) The facts in the record indicate the probable existence of valid and valuable causes of action, and since there were no [390 U.S. 414, 417] facts permitting a reasoned judgment that these claims should be compromised as the plan provides,

approval of the compromises was not justified. Pp. 438-441.

2. The District Court erred in relying upon only the debtor's past earnings in determining its value as a going concern. Without having evidence relating to the debtor's future prospects, the court could not assess its going-concern value or properly determine that the debtor was insolvent. Pp. 441-453.

(a) Whether a reorganization plan excluding junior interests (here stockholders) meets the statutory requirement that the plan be "fair and equitable" depends upon the value of the reorganized company. Since the District Court did not apply the proper valuation standards, its determination of insolvency was improper and the reorganization plan cannot stand. P. 441.

(b) The valuation of a company undergoing reorganization must include an estimate based on an informed judgment embracing all facts relevant to future earning capacity. P. 442.

(c) The value of the debtor's business depended "not on the inherent value of its assets but primarily on maintaining a high level of earnings." P. 443.

(d) The trial judge's steadfast refusal to consider the company's value once it was out of the reorganization proceedings constituted an error which infected his conclusion that the debtor was insolvent. P. 444.

(e) In the circumstances of this case, which involve a company which had established and increased its share of a highly competitive market despite intense competition and major internal crises, an adequate notion of its going-concern value required looking to the future as well as the past. P. 446.

(f) The information introduced at the two insolvency hearings was inadequate for even a rough evaluation of TMT's future prospects, a situation which resulted

from the trial judge's hostility to evidence concerning the company's future. Pp. 447-451.

364 F.2d 936, reversed and remanded.

Irwin L. Langbein argued the cause for petitioner. With him on the briefs was Irma S. Mason.

William P. Simmons, Jr., argued the cause and filed a brief for respondent Anderson. M. James Spitzer [390 U.S. 414, 418] argued the cause for respondents Shaffer et al. With him on the brief were Ronald J. Offenkrantz and Jackson L. Peters.

David Ferber, by special leave of Court, argued the cause for respondent Securities and Exchange Commission. With him on the briefs were Solicitor General Griswold, Ralph S. Spritzer, Daniel M. Friedman, Philip A. Loomis, Jr., and Paul Gonson.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves a corporate reorganization under Chapter X of the Bankruptcy Act, 52 Stat. 883, 11 U.S.C. 501-676. In the most recent proceedings 1 the District Court approved an amended plan of reorganization and discharged the petitioner Committee. 2 The Court of Appeals for the Fifth Circuit affirmed, 364 F.2d 936 (1966). We granted certiorari, 387 U.S. 929 (1967), because this case presents important questions under the bankruptcy laws. Since we believe the Court of Appeals erred in affirming the decision of the District Court, we reverse the judgment and remand for further proceedings consistent with the views expressed below. [390 U.S. 414, 419]

I.

The debtor, TMT Trailer Ferry, Inc., was incorporated in 1954. Its principal business is transporting freight between Florida and Puerto Rico. It pioneered "fishyback" transport, the ocean-going equivalent of "piggyback" transport. Freight loaded into highway trailers is rolled on and off sea-going barges without rehandling. In its original operations TMT used rented tugs to tow converted Navy LST's loaded with such trailers and other freight. Later it undertook to convert a self-propelled Navy LSD for use in its business. Substantial debts and losses arose from the unsuccessful conversion and consequent failure in service of this ship, dubbed the Carib Queen.

In addition, between 1954 and 1957, more than 4,000,000 shares of TMT common stock were issued, many of them acquired at low prices by persons close to the company and disposed of to the public at relatively high prices. As a result of these transactions and others, TMT became unable to meet its obligations, and a reorganization proceeding was initiated against it by involuntary petition in June 1957. The debtor consented to reorganization, and C. Gordon Anderson was appointed trustee. The motion of the holders of preferred ship mortgages on the debtor's vessels (the Caplan mortgage) to foreclose their liens was denied by the trial court. On appeal from this order, it was pointed out that no plan of reorganization had yet been proposed, that the possibility of successful reorganization had not been explored, and that no evidence had been received to support any of the court's orders. The Court of Appeals reversed and remanded with instructions that the holders of the Caplan mortgage be permitted to foreclose unless adequate provision was made to protect their interests or unless they would not be prejudiced by further delay. [390 U.S. 414, 420]

Upon remand the trial court held appropriate hearings. It was determined that the debtor was being operated in a manner which would produce substantial profits. A plan of

reorganization was proposed which would have given the Caplan mortgage group all the common stock in the reorganized company, a substantial portion of the preferred stock, and control of the board of directors. In February 1959, without a hearing called for that purpose and solely on the basis of documents and records, the trial court declared the debtor insolvent and held that the original stockholders had no further interest in the reorganized corporation. In March 1959 the plan of reorganization was confirmed, and Anderson resigned as trustee to become president of the reorganized company. A new trustee was appointed, and he sought in effect to vacate the order confirming the plan. His petition alleged that the holders of the Caplan mortgage and Merrill-Stevens Dry Dock & Repair Co. (M-S), another substantial creditor, had entered into an undisclosed agreement in violation of 221 of Chapter X, 52 Stat. 897, 11 U.S.C. 621, an agreement according to which the Caplan mortgage group would pay M-S in order to procure its consent to the plan of reorganization. This petition was denied, the successor trustee wasremoved, and Anderson was reinstated as trustee.

The petitioner Committee appealed from the order confirming the reorganization plan. Objection was made to the failure of the trial court to order an investigation into the claims of certain creditors and to the failure to conduct a hearing on insolvency. While that appeal was pending, the Caplan group, supported by Anderson, petitioned the trial court to consummate the confirmed plan. The Securities and Exchange Commission, however, filed a petition in the trial court seeking an investigation. 3 It [390 U.S. 414, 421] alleged that an investigation would disclose that the plan was unfair because it turned the corporation over to persons who had dealt extensively in the stock of the debtor in transactions which were probably illegal. It was agreed among the parties that an investigation should be made.

Anderson, in his re-established role as trustee, conducted the investigation. Fourteen days of hearings were held, 2,200 pages of testimony transcribed, and some 60 exhibits collected. Anderson's report from this investigation covers 40 pages in the original record. He concluded that the debtor's business had been "wrecked by gross mismanagement, by unwise and unsound expansion financed primarily through the sale of securities in disregard of the protective provisions of the Securities Act of 1933," and that the debtor had substantial causes of action against holders of the Caplan mortgage. Upon the recommendation of Anderson, the trial court vacated its order confirming the 1959 plan, and the Court of Appeals affirmed. 4

Early in 1962 two new plans of reorganization were proposed. The "internal plan," recommended by Anderson, provided for reorganizing the debtor by issuing new common stock to creditors and involved "compromises" of the Caplan mortgage and M-S claims. The "cash plan" entailed similar "compromises" as well as selling the debtor's assets for cash to persons unconnected with the company and distributing the cash [390 U.S. 414, 422] to creditors. Neither plan provided for any participation by stockholders. The Committee, supported by the SEC, objected to the exclusion of stockholders from both plans, and opposed the internal plan because it contemplated that Anderson would become president of the reorganized company. After hearings on valuation, the District Court found the debtor insolvent and approved both plans as fair, equitable, and feasible. A majority of all classes of creditors other than the United States accepted the internal plan, and the District Court confirmed it in February 1963. The Committee appealed, supported by the SEC, arguing that the plan wrongly excluded stockholders and improperly contemplated that Anderson would become president. The Court of Appeals ruled, without reaching the other contentions, that it was permissible for the plan to contemplate that Anderson would

become president, 5 but it held in a separate appeal that the plan was defective for not giving priority to the Government's nontax claims. 6 The case was accordingly remanded to the District Court for determination of whether the plan would be feasible if the Government's claims were given full priority.

On remand further hearings were held, the District Court found that if the Government's nontax claims were given priority the plan would be feasible, and amendments were authorized which provided for immediate cash payment to the Government. The court regarded the failure of the Court of Appeals to reverse its other orders as in effect an affirmance of them, and it refused to consider again the contentions of the Committee and the SEC. The creditors accepted the amended plan and, over the objections of the Committee and the SEC that the plan was not fairor equitable, the District [390 U.S. 414, 423] Court affirmed it. The Committee again appealed, and the Court of Appeals ruled that its earlier decision had left open all issues not in terms discussed and decided. 7 Passing over the fact that the District Court had considered the case in erroneous legal perspective, and emphasizing that its obligation was to determine whether the trial judge had "abused his discretion" or reached conclusions which were "clearly erroneous," the Court of Appeals refused to remand the case. Stating that "[t]his . . . litigation must at long last be brought to an end," the Court of Appeals affirmed all judgments and orders of the District Court. The Committee, again supported by the SEC, has presented a number of questions on certiorari to this Court. 8 Because of the view we take of this case, it is necessary to consider only the questions of whether it was error to affirm the District Court's approval of compromises of substantial claims against the debtor, and whether it was error to affirm the District Court's judgment that the debtor was insolvent, when that judgment was rendered without

considering the future estimated earnings of the reorganized company. [390 U.S. 414, 424]

II.

Compromises are "a normal part of the process of reorganization." Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time, however, it is essential that every important determination in reorganization proceedings receive the "informed, independent judgment" of the bankruptcy court. National Surety Co. v. Coriell, 289 U.S. 426, 436 (1933). The requirements of 174 and 221 (2) of Chapter X, 52 Stat. 891, 897, 11 U.S.C. 574, 621 (2), that plans of reorganization be both "fair and equitable," apply to compromises just as to other aspects of reorganizations. Ashbach v. Kirtley, 289 F.2d 159 (C. A. 8th Cir. 1961); Conway v. Silesian-American Corp., 186 F.2d 201 (C. A. 2d Cir. 1950). The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable. In re Chicago Rapid Transit Co., 196 F.2d 484 (C. A. 7th Cir. 1952). There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.

Basic to this process in every [390 U.S. 414, 425] instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation. It is here that we must start in the present case.

The Caplan mortgage, consisting of preferred ship mortgages on the debtor's vessels, bears a face amount of $330,000. The holders paid $280,500 for it. Under the proposed compromise, the holders would receive $280,500 paid in five annual cash installments, plus interest from the original due date. 9 The claims filed against the debtor's estate by M-S totaled $1,628,284, of which $574,580 was said to be secured by maritime liens on the debtor's vessels. Under the terms of the compromise, these claims are to be allowed in full, after reducing them all to the status of unsecured claims. As with other unsecured claims, they would be paid for by issuing common stock in the reorganized company. M-S would wind up holding approximately 40% of the stock in the new company. 10 A glance at these terms makes it clear that the compromises involve substantial recognition of the claims filed by the Caplan group and M-S against the debtor. Whether compromising on these terms was fair and equitable to the debtor, the other creditors, and the stockholders depends upon the proper assessment of the claims which the debtor allegedly had against both the Caplan group and M-S.

The Caplan mortgage was the focal point of the 1960 investigation conducted by the trustee, Anderson. The [390 U.S. 414, 426] mortgage was entered into shortly before the petition in bankruptcy was filed. It was needed to raise cash to meet payments due on the Carib Queen. After an extensive investigation, Anderson concluded that the mortgage was a fraudulent transfer not given for fair consideration. Anderson's report succinctly stated the unfairness of the terms of the mortgage:

> "The Caplan Group paid $280,500 cash for the mortgage to TMT which paid all of the expenses of the transaction. The mortgage was for $330,000 payable in seven months and is convertible into common stock at the option of the holders, one share of common for each $1.25 of principal amount of the mortgage. This gave the Caplan Group an effective interest rate of 30% per annum prior to maturity and an opportunity to straddle because of the conversion feature. If TMT prospered, they could convert the mortgage into common stock for which they would have paid little more than $1.00 per share; if TMT did not, the Caplan Mortgage was in a senior position and constituted a lien on TMT's prime assets, absolutely necessary to the Company's operation. Since the Carib Queen had broken down, the vessels encumbered by the mortgage were the main producers of income for the company."

Anderson found that there was "ample evidence" to support this view of the mortgage, and that therefore the mortgage should be treated as null and void. So treating it would not release TMT from the obligation to repay the money received, but in claiming that amount the holders of the mortgage would have no higher status than general unsecured creditors. 11 [390 U.S. 414, 427].]

In addition, Anderson's report concluded that the principal holders of the Caplan mortgage, Abrams, Shaffer, and Erdman, had diverted corporate opportunities through the flagrant abuse of their control, fiduciary or inside positions, and should be made to account for the profits they had made. Nearly half of the roughly 4,000,000 shares of outstanding TMT common stock reached the public via purported private offerings through Abrams and Shaffer. These two men exercised a high degree of control over the affairs of the company, and Erdman went along with them and participated in many of their transactions. Anderson found

that these three occupied a fiduciary relationship with TMT, at least insofar as issuance of capital stock to them was concerned. "They took advantage of their inside position to obtain stock for less than the market price which they sold to the public without any registration under the Securities Act and in apparent violation of the private offering exemption under which all of the stock was issued." The activities of these three men substantially lessened TMT's chances of obtaining financing from reputable financial institutions "and by the time the Caplan mortgage was executed they were in a position to dictate terms which TMT would be forced to accept." Anderson's report continued:

> "It is the opinion of the trustee that persons such as Abrams, Shaffer and Erdman who come in as creditors of TMT under the Caplan Mortgage . . . should be barred in this equity proceeding from profiting at TMT's expense. Their claims should be reduced by the profits they have made on sales of TMT stock which they acquired for private investment [390 U.S. 414, 428] purposes, but which they sold in violation of the law at great profit to themselves. These profits are either admitted or readily ascertainable and should be returned to the company."

Characterizing the conduct of Abrams, Shaffer, and Erdman in acquiring unregistered TMT stock with no intention of holding it for investment as a "fraud," Anderson indicated the possibility of liability under the SEC's Rule 10b-5. 12 Anderson said that at a minimum their claims should be subordinated to those of innocent creditors. 13

As a result of the report filed by trustee Anderson, the order confirming the 1959 plan of reorganization was vacated. Both the trustee and the SEC filed objections to the Caplan mortgage claim, grounded on the reasons presented in the report of the investigation. The District Court never held

hearings on these objections. The mortgage was not set aside as a fraudulent transfer, nor was it decided to use the claims against Abrams, Shaffer, and Erdman as setoffs or as a means of subordinating the mortgage claims. Rather, the internal plan of reorganization was approved by the District Court, providing for a "compromise" of the Caplan mortgage along the lines already indicated. The holders of the mortgage were to receive in cash what they had put up for the mortgage, plus interest on the principal from the original due date. 14

Separate from the Caplan mortgage claims were the claims filed by M-S, the company in charge of converting [390 U.S. 414, 429] the Navy LSD into the self-propelled trailership which TMT christened the Carib Queen. These claims totaled $1,628,284, of which over $1,000,000 was for the unpaid balance due for converting the Carib Queen. Maritime liens on other vessels owned by TMT allegedly secured $574,580 worth of these claims. The United States, in its position as a substantial creditor of TMT, filed objections to M-S claims, stating that none of them were entitled to status as secured claims "for the reason that they arose more than one year prior to the commencement of the reorganization proceedings herein." It also contended that the claims had no status as secured lien claims, for "it is a recognized principle of Admiralty and Maritime law that claims for the conversion or reconstruction of vessels do not give rise to Maritime liens." Whether the portion of the claims for which M-S asserts secured status is actually entitled to that status has never been determined. The "compromise" of the M-S claims amounted to allowing them in their entirety as unsecured claims.

On the maiden voyage of the Carib Queen a series of boiler failures caused the vessel to break down and necessitated extensive repairs. In November 1958 the petitioner Committee notified the District Court that in its opinion the

"series of catastrophes" which had befallen the Carib Queen was due to "faulty design, inadequate inspection, defective work on the remodeling and later repair of the ship, hasty and improper preparations for a hazardous sea voyage and utilization of the ship in a service for which she was not fitted and in an unseaworthy condition." The Committee thought that TMT had causes of action which could lead to the recovery of substantial sums of money. Although Anderson's report on his subsequent investigation of the affairs of TMT dealt with causes of action other than those associated [390 U.S. 414, 430] with the Caplan mortgage, it made no mention of any claims TMT might have against M-S. The SEC objected to the M-S claims, stating that there were grounds for disallowing them and that the matter should be referred to a special master for investigation. Trustee Anderson also sought reference of these claims to a special master. On September 1, 1961, the SEC filed detailed specifications of its objections to the M-S claims, based on its own investigation into them. The SEC stated that the debtor.

> "has meritorious defenses and an offset or counter-claim because M-S (a) did not properly convert the vessel; (b) did not comply with the terms of the contract; (c) did not properly repair the vessel; and (d) performed certain work for and furnished certain materials to TMT, with no agreement as to price; M-S has failed to establish the value of such work and materials."

The SEC described with some particularity the facts which had led it to this conclusion. The most important of these related to the boiler failure which occurred shortly after M-S delivered the Carib Queen for its maiden voyage. Within 48 hours of sailing from Jacksonville, Florida, bound for San Juan, Puerto Rico, it was discovered that a boiler and several tubes were leaking. Tubes overheated, ruptured, and were distorted as a result of scale which had formed on their inner

surfaces. The SEC attributed the scale to M-S' negligence in running the boilers with raw water. The SEC also stated that the improper priming of the boilers that occurred on the first trip was due to installation of incorrect baffles by M-S. M-S had undertaken to make the required repairs, and the SEC stated that this repair work was performed negligently, leading to further tube failures. [390 U.S. 414, 431] Part of the M-S claims was for unpaid charges for this repair work. M-S filed an answer on September 1 which admitted that when the Carib Queen was delivered it was suffering from "certain construction deficiencies," but denied any liability. It contended that its asserted lien claims were secured and that it had performed the repair work in a proper manner.

Although the SEC and the trustee had sought reference of the M-S claims to a special master for a hearing, no such hearing was ever held. Instead, the trustee subsequently moved for the summary allowance of the claims on the ground that there was only a "remote" possibility of materially reducing them by litigating the objections filed against them, and that such litigation would cause "unnecessary delay." 15 At the hearing during which the trustee presented his motion for allowing the M-S claims in full, no further explanation of this recommendation was provided. Counsel for the Committee protested that "this is not a report, this is a bare statement of conclusion." The trial judge himself recognized the importance of the question. He said:

> "I am concerned myself. I do know that whoever turned that vessel [the Carib Queen] loose with the [390 U.S. 414, 432] boilers in it, somebody made a bad mistake. I don't know who it was."

The matter was put over, and subsequently the Committee, supported by the Commission, the Department of Justice, and the Caplan mortgage group, filed objections. Notwithstanding these objections, and the doubts that he had earlier expressed, the trial judge confirmed the claims in full

as unsecured claims without further investigation of them. M-S, under the confirmed plan, is to receive 40% of the common stock of the reorganized company.

On July 11, 1962, the trial court filed its opinion and order approving both the internal and the cash plans of reorganization. The internal plan contained the provisions for "compromising" the Caplan mortgage and M-S claims. With regard to these sets of claims, the trial court stated that "it was apparent" that successful litigation of the claims TMT had against the holders of these claims "would take possibly years to conclude. . . ." The court continued:

> "It is the opinion of the court that these compromises are fair and equitable under the circumstances and they are hereby approved for inclusion in the Internal Plan. The court approves the opinion expressed by the attorney for the trustee that no better compromises can be obtained for the debtor, that the prospect of material reduction in the amount of these claims does not warrant the extensive litigation that would otherwise be required, and that the prospect of recoveries beyond the amount of the claims as urged by the Securities and Exchange Commission and the Stockholders' Committee is too remote for serious consideration. . . . The alternative to approval of these compromises is extensive litigation at heavy expense to the debtor and unnecessary [390 U.S. 414, 433] delay in reorganization contrary to the intent and purpose of Chapter X of the Bankruptcy Act."

This statement constitutes the only, and the last, 16 word that the trial court said on the merits of the compromises of the Caplan mortgage and M-S claims. Without reference to any of the objections that had been filed or to the substantial facts in the record tending to cast doubt upon the Caplan mortgage and M-S claims, the court accepted the bald conclusions of the trustee. This despite the fact that the trustee had once

concluded that the Caplan mortgage was null and void and that TMT had sizeable setoffs against its holders. This despite the fact that the trustee had once sought reference of the M-S claims to a special master for investigation. This despite the fact that the trustee had never placed on the record any of the facts of his subsequent investigation [390 U.S. 414, 434] and had never provided any explanation of why he had completely reversed his field on these claims. Although at this point in the proceedings it was clear that Anderson was to become president of the reorganized company, and though the trial court was understandably eager to wind up these protracted proceedings, there nowhere appears an adequate explanation for the trustee's cursory, conclusory recommendation of these "compromises," or the perfunctory, almost offhand, manner in which the court accepted that recommendation.

If the quoted statement of the trial court had been the result of an adequate and intelligent consideration of the merits of the claims, the difficulties of pursuing them, the potential harm to the debtor's estate caused by delay, and the fairness of the terms of settlement, then it would without question have been justifiable to approve the proposed compromises. It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law. Here there is no explanation of how the strengths and weaknesses of the debtor's causes of action were evaluated or upon what grounds it was concluded that a settlement which allowed the creditor's claims in major part was "fair and equitable." Although we are told that the alternative to settlement was "extensive litigation at heavy expense" and "unnecessary delay," there is no evidence that this conclusion was based upon an educated estimate of the complexity, expense, and likely duration of

the litigation. Litigation and delay are always the alternative to settlement, and whether that alternative is worth pursuing necessarily depends upon a reasoned judgment as to the probable outcome of litigation. The complaint voiced by [390 U.S. 414, 435] counsel for the petitioner Committee to the trustee's report on the compromises, that "this is a bare statement of conclusion," seems equally applicable to the trial court's statement approving those compromises. In these circumstances it was error to affirm that aspect of the District Court's judgment approving inclusion of the proposed compromises in the internal plan of reorganization.

The Court of Appeals dealt with the District Court's approval of the compromises in five sentences. Noting that it was only the Committee and the SEC that were complaining, and remarking that it was unlikely that disallowance of the compromises would result in solvency, it felt that it was "significant that not a single creditor has ever complained of either compromise." 364 F.2d 936, 941. The question of insolvency will be returned to shortly. The argument that the compromises were properly approved because no creditors objected to them seems doubly dubious. When a bankruptcy court either fails adequately to investigate potential legal claims held by the debtor, or refuses to provide an adequate explanation of the basis for approving compromises, it is scarcely surprising that creditors fail to come forward with objections to the compromises. Moreover, this Court has held that a plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it. 17 [390 U.S. 414, 436]

The principal argument of the respondent supporting affirmance of the order approving the compromises is that "the district court had before it a thorough record concerning the facts and issues with respect to the compromises of these two claims." Respondent's Brief 38. With regard to the

Caplan mortgage claim, respondent points out that the facts and circumstances surrounding it were thoroughly documented in Anderson's report of his investigation. It is difficult to see how this strengthens respondent's position, however, for the report carefully documented the conclusion that the Caplan mortgage was a fraudulent transfer and that claims against the individual holders of the mortgage could be used as setoffs. The District Court's approval of the proposed compromise in the face of the facts and conclusions contained in the trustee's report is more difficult to understand than would be approval entered on a blank slate. Respondent also points out that the trial court had before it an answer to Anderson's report, the various objections filed to the mortgage claim, the claim itself, and the recommendations of the Creditors' Committee, the trustee and the trustee's counsel favoring the proposed settlement. The objections filed to the claim militate against the advisability of compromise, however, and the other matters referred to consist either of conclusory denials of liability or conclusory statements that the claims should be compromised. There is nothing in all these documents which could provide a sound basis for concluding that the claims against the mortgage and its holders were unmeritorious. 18 If the [390 U.S. 414, 437] trial court ever had before it facts which showed the claims against the Caplan mortgage and its holders to be without merit, or if the court ever discovered sound grounds for thinking that the delay incident to litigation or the unlikelihood of obtaining an adequate recovery, made compromise advisable, nothing in this record indicates it.

With regard to the M-S claims, respondent contends that the record contains "an abundance of pleadings and allegations" respecting them. Respondent's Brief 33. To make an informed and independent judgment, however, the court needs facts, not allegations. Respondent also contends that there were sufficient facts in the record, and provides a long

list of references to the places in the record where these facts can be found. If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based. The deficiency in this case, however, is not a merely formal one. The evidence referred to by respondent is analyzed at greater length in the margin. 19 [390 U.S. 414, 438] Here it is enough to say that to the extent that the record contains solid facts of the sort necessary for appraising the merits of the claims against M-S, virtually all of them point to the probable existence of valid [390 U.S. 414, 439] and valuable causes of action. Balancing these facts are nothing but bald assertions to the contrary and general conclusions for which foundations nowhere appear. Particularly noteworthy is the fact that, despite frequent [390 U.S. 414, 440] requests for an investigation, and notwithstanding the fact that the available evidence pointed to probably valid claims against M-S, no investigation of these matters was ever undertaken or ordered by the trial court. It is difficult to imagine how an informed and independent decision in favor of compromising the M-S claims in the full amount as unsecured claims could have been reached on the present state of the record.

The record before us leaves us completely uninformed as to whether the trial court ever evaluated the merits of the causes of actions held by the debtor, the prospects and problems of litigating those claims, or the fairness of the terms of compromise. More than this, the record is devoid of facts which would have permitted a reasoned [390 U.S. 414, 441] judgment that the claims of actions should be settled in this fashion. In reaching this conclusion, however, it is necessary to emphasize that we intimate no opinion as to the merits of the debtor's causes of action or as to the actual fairness of the proposed compromises. To the contrary, it is clear that the

present record is inadequate for assessing either, and that a remand is necessary to permit further hearings to be held. Only after further investigation can it be determined whether, and on what terms, these claims should be compromised.

III.

Under 174, 221 (2), of Chapter X, 52 Stat. 891, 897, 11 U.S.C. 574, 621 (2), a bankruptcy court is not to approve or confirm a plan of reorganization unless it is found to be "fair and equitable." This standard incorporates the absolute priority doctrine under which creditors and stockholders may participate only in accordance with their respective priorities, and "in any plan of corporate reorganization unsecured creditors are entitled to priority over stockholders to the full extent of their debts . . . ." SEC v. United States Realty & Improvement Co., 310 U.S. 434, 452 (1940). Since participation by junior interests depends upon the claims of senior interests being fully satisfied, whether a plan of reorganization excluding junior interests is fair and equitable depends upon the value of the reorganized company. In the present case the District Court excluded the stockholders from participation because of its finding that the debtor was insolvent. Since the determination of insolvency was not made in accordance with the proper standards of valuation, neither the approval nor the confirmation of the plan can stand.

> The appropriate standard for valuing a company undergoing reorganization was set out at length in Consolidated [390 U.S. 414, 442] Rock Products Co. v. Du Bois, 312 U.S. 510, 526 (1941): "As Mr. Justice Holmes said in Galveston, H. & S. A. Ry. Co. v. Texas, 210 U.S. 217, 226, `the commercial value of property consists in the expectation of income from it.' . . . Such criterion is the appropriate one here, since we are dealing with the issue of solvency arising in connection with reorganization plans

> involving productive properties. . . . The criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable. . . . Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance." 20

In the present case the book value of the debtor's assets on May 31, 1962, was $1,887,185.77. Claims against the [390 U.S. 414, 443] debtor totaled $5,477,370.05. The actual fair value of the debtor's total assets was $2,238,387.62 and their net value was $1,978,481.73. Although these figures show that liabilities far exceeded assets, they are not of controlling importance. The District Court recognized that going-concern value, not book or appraisal value, must govern determination of the fairness of the plans of reorganization, and respondent concedes that the value of TMT's business depended "not on the inherent value of its assets but primarily on maintaining a high level of earnings." Brief for Respondent 42.

At the valuation hearings the trustee stated that his analysis of the financial structure and business of the debtor resulted in a going-concern value of $2,031,403.72. A valuation expert presented by the trustee estimated the going-concern value at between $1,607,692 and $1,800,000. He arrived at his conclusion by multiplying his estimate of the future earnings of the company by 7.7, a figure based on the

assumption that earnings would be 13% of value. The valuation expert presented by the Committee concluded that estimated future earnings after taxes would be $327,500, and multiplying this by a price-earnings ratio of 13.8, arrived at the conclusion that TMT had a value of $4,519,500. The trial judge took an intermediate position. By projecting current earnings of the debtor for the first five months of 1962 over the remainder of the year, he concluded that pre-tax earnings would be $568,000. Reduced by estimated income taxes and capitalized at 10%, this yielded a going-concern value of $2,780,000. Since this figure fell well below the $5,477,370.05 of outstanding claims, he concluded that the debtor was insolvent. On this basis the plan was approved and confirmed.

When the Court of Appeals remanded to the District Court for determination of the feasibility of the reorganization plan after giving full priority to the Government's [390 U.S. 414, 444] claims, the District Court concluded that TMT was "more insolvent now than it was in 1962," for earnings had declined from the high point of 1962, and the Court's initial determination had been based on the projected earnings for that year. The decline in earnings had occurred even though the volume of business had grown substantially, for increased competition from large steamship lines serving Puerto Rico had forced TMT to lower its rates and thus its margin of profit. The District Court reaffirmed its finding of insolvency. On appeal, the Court of Appeals stated that it did not have to determine whether or not the District Court's finding of insolvency was accurately computed, but merely whether it was "clearly erroneous." On this basis the conclusion of insolvency was affirmed.

In a complex case of this nature it is not the province of this Court to attempt to retry issues of fact which have been fully litigated below. Indeed, as the Court of Appeals stated, much weight must be given to the long familiarity of the District

Judge with the debtor and to his evaluation of the witnesses who testified in his presence. In the face of conflicting expert testimony as to the going-concern value of the debtor based on current earnings, the trial judge adopted a position in between. We are not disposed to dispute the conclusion of the Court of Appeals that this determination by the trial judge was not "clearly erroneous." However, examination of the facts of this case demonstrates that the District Court did not have before it all of the evidence and testimony relating to the future problems and prospects of the company which were necessary to assess its value as a going concern. Indeed, the trial judge steadfastly refused to consider the value of the company once it was out of the reorganization proceedings. In this there was error, and it was an error which infected the conclusions of the trial court that the debtor was insolvent. [390 U.S. 414, 445] Evaluations of evidence reached by the accurate application of erroneous legal standards are erroneous evaluations.

TMT plays a minor but unique role in carrying goods between Puerto Rico and the United States. This domestic offshore trade is highly competitive and generally unprofitable. The high density, high volume, and high operating-cost trade with Puerto Rico flows in and through the North Atlantic ports. TMT, operating in a triangle between San Juan, Miami, and Jacksonville, is confined to the low density, low investment South Atlantic trade. TMT carries only about 2% of the total trade with Puerto Rico, and the dominant carrier in the market is in direct competition with it in its home port of Jacksonville. When TMT entered the market with its novel idea of carrying roll-on and roll-off freight in towed vessels, the market was ripe for an innovation of this sort. However, the ills which plagued its early years threw TMT into bankruptcy in 1957. Prevented by the exigencies of the bankruptcy proceeding from capitalizing on the novel idea it had introduced, TMT has watched the development of container shipping, which has

taken over a large share of the United States-Puerto Rico trade for which it might otherwise have hoped to compete. Nonetheless, TMT remains the only roll-on and roll-off carrier in the trade, and it has seen its own business rise 10% to 20% a year due to the increased frequency of direct interchange with piggyback rail transport. Despite the inability of TMT to capitalize on its novel idea, it has remained in a strong competitive position. Trade with Puerto Rico has increased steadily and rapidly, and TMT's business has grown commensurately. Despite a destructive rate war which markedly lowered the revenues earned per voyage, TMT increased its revenue from $3,801,000 in 1962, when the first insolvency hearing [390 U.S. 414, 446] was held, to $4,779,000 in 1964, the latest year in the record. Between the 1962 and the 1965 hearings the fleet of vessels was increased from three to five and the number of truck trailers from 350 to 670. Moreover, in the 1965 hearing the business manager could report that after it paid the forthcoming installment for the reconversion of one of its vessels, the company would have no further significant outstanding indebtedness. TMT has continued to be the only unsubsidized carrier in the South Atlantic trade, the only one that makes money. Despite the increase in volume and revenue, however, the rate war and other factors such as rising costs caused net earnings to drop after 1962, and they have not yet regained the level established that year. TMT's tax-loss carry-over has expired, with the result that earnings are now substantially reduced by federal taxes. The general trade picture between Puerto Rico and the United States is in flux, and the rates applicable to the trade are undergoing continuing revision and investigation. The vessels TMT uses are old and in need of replacement. The supply of LST's has nearly dried up, and it seems to be understood that the replacement vessels will have to be built from scratch.

In short, TMT would seem to be a company which has established, preserved, and increased its share of a highly

competitive market despite intense competition and major internal crises. It operates in a market undergoing substantial change and is itself faced with the imminent need to re-equip its fleet. In these circumstances, an adequate notion of the going-concern value of TMT could be obtained only by looking to the future as well as the past. Against this background we must examine the information which the trial court had before it for assessing the future prospects of TMT. The basic source for information on these matters was, of course, the trustee and his business manager. A short summary of [390 U.S. 414, 447] the highlights of their testimony as it related to the future prospects of TMT will demonstrate the inadequacy of the information provided the trial judge for making this crucial determination.

At the first insolvency hearing the business manager attempted to estimate the earnings of the company for the next four years, but he made his projections solely on the business as it then was. Although TMT had attained the maximum number of voyages possible with the fleet it then had, the business manager had not looked into the possibility of chartering additional vessels. The trustee testified that several vessels would have to be replaced in the next two years, but admitted that he was unable to predict what such vessels would cost. When the trustee was asked if there was foreseeable room for expansion of TMT's business, the Court agreed with an objection that this was beyond the scope of the valuation hearing. The trustee's expert on valuation gave his opinion as to going-concern value solely on the basis of the trustee's projection of earnings, which in turn was based wholly on past earnings. Those earnings figures had been drawn up some time prior to the hearing, and it was conceded that they might have come out differently if the projection had been made at the time of the valuation hearing. When asked if he would attempt to predict whether the company would be able to pay dividends once it was out of reorganization, or whether large capital investments

would soak up all earnings, the trustee's expert replied that he had not been asked to consider that question and did not think it legitimate. Although he agreed that reasonably foreseeable changes and improvements should be taken into account in valuing the company, he stated that he had been given no information on which to make such predictions. [390 U.S. 414, 448]

At the second hearing on the value of the company, the business manager admitted that he had made no new projection of future expenses, revenue, or income, even though three years had passed and the business outlook of the firm was markedly different. Although TMT's fleet had grown in the interim from three to five vessels, and there was an imminent need for replacement of the older ships, the business manager was unable to predict the likely impact on earnings of the acquisition of newer vessels. He stated that the new vessels would be towed craft that loaded from the stern, and that they were apt to cost between $1,250,000 and $1,500,000 each. However, though some studies and inquiries had been conducted, there were no final or definite plans or drawings for the new ships. Although new, better, and more efficient vessels were needed soon to improve the company's competitive situation, in the present state of planning it would be two years after the company was out of reorganization before new vessels would be obtained. At the second hearing, as at the first, the business manager could give no estimate of what portion of the administration costs of running TMT was due to the reorganization proceedings. Although he thought that trade between the United States and Puerto Rico was increasing, he did not know how much or in what ways. Though he thought that TMT's share of the Puerto Rican trade was remaining comparatively constant, he did not know for certain. He also did not know what portion of TMT's present volume of business was attributable to direct piggyback interchange.

The data which the trustee and his business manager had submitted with regard to past income and expenses undoubtedly provided a clear picture of what the company had been experiencing in the past. Given, however, that it was a relatively small and young company [390 U.S. 414, 449] much in need of internal rebuilding and operating in a market undergoing important economic and technological change, it was essential that some clear idea be gained of its future prospects. It seems perfectly obvious that the information introduced at the two hearings was inadequate for gaining even a rough idea of TMT's future prospects.

The fundamental reason that there was insufficient evidence concerning the future prospects of TMT was that the trial court showed itself unalterably hostile to inquiries directed to TMT's future. During the first hearing the following interchange took place when the court cut off a question aimed at determining whether the volume of TMT's southbound traffic could be increased during the off-peak season:

> "Q. But if this enterprise were out from under the proceedings, would it?
> "The COURT. Well, we are dealing with an organization that is in. Let's assume that it will stay right there and try to get the value. It is not going to get out until it is reorganized.
> "Mr. MASON. We are trying to get the value when reorganized.
> "The COURT. That is of no importance to me. Let's value it as it now exists to determine what should be done in these proceedings."

At a later time, when counsel again sought to establish that the proper way to value the company was to try to determine foreseeable factors which would affect future earnings, the court pre-empted the answer by remarking, "Mr. Witness, we do not want possibilities." Still later, the judge said:

> "All these projections into the future are not going to bother the Court. These creditors have waited [390 U.S. 414, 450] too long to get their money. We have had this thing for years and years. I imagine most of them long since have gone to the poorhouse or given up."

One can easily sympathize with the desire of a court to terminate bankruptcy reorganization proceedings, for they are frequently protracted. The need for expedition, however, is not a justification for abandoning proper standards. It is also easy to share the court's concern that creditors receive their money as promptly as possible. However, the right of stockholders to participate at all hung on the result of the valuation proceedings; sedulously eliminating all inquiry into the future may, in this context, have caused the rights of the stockholders to have been relinquished by default.

Although three years elapsed before the next hearing, the judge displayed the same unwillingness to permit inquiry into the future prospects of TMT. When counsel for the SECtried to open up the subject, the following dialogue occurred:

> "Mr. GONSEN. We have no startling figures, but a series of questions relating to the possible future prospects of this company.
> "The COURT. There is no possible future prospects other than what is going on. It is possible it will become the greatest fleet in the world and it is possible to go bankrupt in a few months. As a matter of fact, if the competition had succeeded in their plans, you would have no problem here, they would have been sold.
> "Mr. GONSEN. Do I understand Your Honor does not desire me to examine as to evaluation?
> "The COURT. You do."

Perhaps the proper reading of the reluctance of the judge to go into future prospects at the second hearing was that in his view the issue of insolvency was no longer in [390 U.S. 414, 451] the case. The Court of Appeals had ruled on the question of whether the trustee could be the president of the reorganized company and whether the Government's nontax claims should be allowed in full without discussing the other issues. In the trial judge's view, the Court of Appeals' failure to speak on other issues constituted affirmance. On the appeal from the second hearing, however, the Court of Appeals took pains to point out the error in this conclusion. The result of the trial court's ruling was to exclude from the hearing the general issue of insolvency and to limit the hearing to the question of whether developments between the first and second hearings had rendered the plan unfeasible in light of the necessity of giving full priority to the Government's nontax claims. In such circumstances it might be expected that the Court of Appeals would have examined the record to see if the facts supported the conclusion which the trial judge had felt foreclosed from having to make again, but which was in fact still in the case. Instead, however, the Court of Appeals merely quoted at length from the trial court's conclusions that the plan was feasible and stated that the ruling that the company was still insolvent was not clearly erroneous.

At the close of the second hearing the SEC and the Committee argued vigorously that the issue of valuation was still open and that future prospects should have been considered by the judge. Although its view of the effect of the appeal from the first hearing did not require it to do so, the court addressed itself to the merits of this contention in its opinion and order approving the amended plan of reorganization:

> "The SEC and the Stockholders Committee insist, as they did during the valuation hearings in 1962, that

> the court should have required evidence of future earnings, subsequent to reorganization, based upon estimates of revenues and expenses after substantial [390 U.S. 414, 452] changes in operations and acquisition and substitution of new type vessels and other equipment, and based upon expanded operations expected to take place under private management. However, neither the trustee [n]or the court can anticipate what the reorganized company will do, and any estimates of future earnings under different circumstances of operation would be speculative and unreliable."

This was not a correct statement or application of the law. This Court has declared that in every case it is incumbent upon the reorganization court to consider "all facts relevant to future earning capacity . . . including . . . all circumstances which indicate whether or not [the past earnings] record is a reliable criterion of future performance." Consolidated Rock Products Co. v. Du Bois, supra. If it is shown that the record of past earnings is not a reliable criterion of future performance, the court must form an estimate of future performance by inquiring into all foreseeable factors which may affect future prospects. In forming this estimate, "mathematical certitude" is neither expected nor required.

In this case we have a company engaged in a hotly competitive market, a market experiencing a severe rate war which would probably alter the relative standings of the competitors. The market as a whole was witnessing substantial technological change, and TMT itself was one of the prime innovators. TMT's principal market, Puerto Rico, was undergoing considerable expansion. It was shown without contradiction that TMT needed to replace its present fleet with new and different ships. It should have been clear to the trial court that the circumstances brought out at the two hearings showed that the past earnings record was not a reliable criterion of future performance, and that sound

evaluation of the [390 U.S. 414, 453] company as a going concern required examination of the future prospects of the company. The court was not dealing with an established company in a static market, nor was it being asked to value the company's future prospects by hypothesizing unforeseeable changes in operations or market structure. It was evident that certain specific and predictable alterations would have to be made in the equipment and operations of the company in order to meet foreseeable alterations in the market. The trial court shut its eyes to these important developments and in so doing ignored a cardinal principle of proper evaluation.

IV.

Because only past earnings were relied upon in this case in determining the value of the debtor as a going concern, we reverse and remand to the Court of Appeals with directions to remand to the District Court to hold new hearings on valuation. Without in any way prejudging the issue, it is possible that when the compromises discussed in Part II of this opinion are reconsidered, and when the company is properly valued by taking into account its future prospects, the company will be found not to be insolvent. Such a finding would permit stockholders to participate. There is, therefore, no point in considering at this juncture the question presented by the petitioner concerning the stockholders' claims under the federal securities laws. Since the Committee will, of course, be entitled to participate in the new hearings on valuation and insolvency, the order of the District Court discharging it is vacated. So doing, however, reflects no opinion on the merits of the arguments presented in this Court by petitioner as to why it should not have been discharged. Finally, there is no necessity to determine whether it was improper to contemplate making the trustee president of the reorganized company. A great deal of time has passed since that was deemed [390 U.S.

414, 454] an advisable plan, and intervening circumstances may well have altered the views of the participants. Since new hearings on valuation and insolvency will further protract these proceedings, it seems advisable to put that question aside.

For the reasons stated in this opinion, we reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

Footnotes

[Footnote 1] This case has been in the federal courts for over 10 years. The earlier reported decisions consist of the following: Caplan v. Anderson, 256 F.2d 416 (C. A. 5th Cir. 1958); Caplan v. Anderson, 259 F.2d 283 (C. A. 5th Cir. 1958); TMT Trailer Ferry, Inc. v. Anderson, 292 F.2d 455 (C. A. 5th Cir. 1961), cert. denied sub nom. Shaffer v. Anderson, 368 U.S. 956 (1962); United States v. Anderson, 334 F.2d 111 (C. A. 5th Cir.), cert. denied, 379 U.S. 879 (1964); In re TMT Trailer Ferry, Inc., 334 F.2d 118 (C. A. 5th Cir. 1964).

[Footnote 2] The order of the District Court discharging the petitioner Committee was later modified to permit the Committee to prosecute appeals from that decision.

[Footnote 3] The SEC participated as a party in both the District Court and the Court of Appeals, and has appeared as an unnamed respondent before this Court. See 52 Stat. 890, 894, 11 U.S.C. 572, [390 U.S. 414, 421] 608. This Court requested the Government to express its views at the petition stage, 386 U.S. 901 (1967). For the most part the SEC has taken positions consistent with those of the petitioner Committee.

[Footnote 4] TMT Trailer Ferry, Inc. v. Anderson, 292 F.2d 455 (C. A. 5th Cir. 1961), cert. denied sub nom. Shaffer v. Anderson, 368 U.S. 956 (1962). The Committee's earlier appeal attacking the confirmation of the 1959 plan, which had been consolidated with this appeal by the Caplan

mortgage group, was mooted by the order of the trial court vacating the confirmation.

[Footnote 5] In re TMT Trailer Ferry, Inc., 334 F.2d 118 (C. A. 5th Cir. 1964).

[Footnote 6] United States v. Anderson, 334 F.2d 111 (C. A. 5th Cir.), cert. denied, 379 U.S. 879 (1964).

[Footnote 7] Protective Committee v. Anderson, 364 F.2d 936, 939 (C. A. 5th Cir. 1966).

[Footnote 8] The other issues, briefed and argued at length, are succinctly stated in the brief filed by the SEC: "1. Whether under Chapter X of the Bankruptcy Act, which provides for a disinterested trustee as the focal point of the reorganization, the trustee is precluded from assuming the presidency of the reorganized company; and whether a plan that contemplates that result may be confirmed. . . . . "4. Whether the courts below erred in refusing to consider the merits of the stockholders' claims based on asserted violations of the securities laws. "5. Whether the district court erred in discharging the Stockholders' Committee before the reorganization proceedings were completed, on the basis of its finding that the debtor was insolvent." Brief for SEC 2, 3.

[Footnote 9] The interest is to be treated as an unsecured claim payable in common stock in the reorganized company. The plan confirmed by the court was later amended to provide that the holders of the Caplan mortgage would receive $250,000 in cash at the date of consummation of the reorganization plan, rather than $280,500 over five years. [Footnote 10] Since the rest of the voting stock will go to the other numerous and scattered general creditors, petitioner argues that M-S' 40% ownership will give it initial working control of the reorganized company. Petitioner's Brief 28, 29.

[Footnote 11] Accordingly, to pay holders of the Caplan mortgage $280,500 in cash, even though only the amount they paid for the mortgage, [390 U.S. 414, 427] would be a substantial preferment of them when the reorganization plan allows general unsecured creditors only a pro rata portion of some 1,300,000 shares of new common stock in the reorganized company.

[Footnote 12] 17 CFR 240.10b-5; promulgated by the SEC pursuant to 10 (b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. 78j.

[Footnote 13] Such subordination would effectively eliminate their claims if TMT were as insolvent as the court subsequently found.

[Footnote 14] These terms were later modified, as indicated in n. 9, supra.

[Footnote 15] The trustee reached this conclusion after an investigation described by him in full as follows: "[T]he trustee, with the assistance of attorneys in the office of his counsel, investigated the facts alleged in the specifications of objections filed by the SEC and in the answer of Merrill-Stevens. This investigation consisted of an examination of numerous documents assembled by the SEC during its investigation, together with copies of statements made by individuals which had been obtained during the investigation. Also examined were numerous documents and statements furnished by Merrill-Stevens in support of its answer to the specifications of objections by the SEC." The trustee did not set out any findings of fact which he arrived at in the course of this "investigation," and provided no explanation of the reasoning which had led to his "considered opinion" that the M-S claims should be allowed in full.

[Footnote 16] In December 1964, after the case had been remanded for the second time by the Court of Appeals, the Committee sought an order for production of documents relating to the Carib Queen, alleging they would show that TMT had a cause of action against M-S and the Caplan group. The Committee said these parties had acted "in collusion with members of the debtor's old management and control group to defraud the Maritime Administration and the debtor by misrepresentation of the reconversion contract price and by premature release of the vessel without proper compliance with the requirements of the reconversion contract. The same documents also bear on the propriety of the compromises . . . ." At the hearing held on this motion it appeared that these documents were held by the Maritime Administration, which had no objection to turning them over but wished the court to issue a formal order so that all parties could have access to them. The court denied the motion, saying "there is nothing in the motion that shows that these documents are material to any issue before this Court." When reconfirming the plan after the second remand, the court added nothing to the explanation quoted in the text, for it erroneously concluded that

approval of the settlement had already been affirmed by the Court of Appeals.

[Footnote 17] Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939). "[W]here a plan is not fair and equitable as a matter of law it cannot be approved by the court . . . . Congress has was told that the trustee and his lawyers had looked at the relevant papers, that the possibility of recovery was remote, and that litigation would cause unnecessary delay. No facts or arguments to support these conclusions were presented. Counsel for the Committee objected that this was not a report but a bare statement of conclusion. The court indicated that someone had been at fault over the boiler breakdown. (9) The Committee's specification of objections to the M-S claims. This 35-page report, 22 pages of which are devoted to the Carib Queen contract, was the result of an independent examination conducted by the Committee into the M-S claims. The Committee charged M-S with faulty design, construction, and repair of the Carib Queen. With regard to two other ships on which M-S worked for TMT, the Committee charged M-S with responsibility for the swamping of one on its trial trip, and with failing to get Coast Guard approval of the other. The Committee also claimed that the maritime liens asserted by M-S had been reduced by payments on account, and that the original TMT management, M-S, and Abrams and Shaffer had worked together in a collusive relationship designed to make large profits by selling cheaply purchased stock to the public at inflated values. Some idea of the factual particularity of the Committee's objections is provided by the abbreviated subheadings of their charges against M-S in connection with the Carib Queen. The Committee stated that TMT had causes of action growing out of the fact that M-S (a) failed to secure proper certificates of work completion affecting the classification and rating of the vessel, (b) failed to fit riveted crack-arresting seams, (c) failed to produce a vessel of 3,050 shaft-horsepower per shaft, propeller speed of 216 r. p. m., and speed in service of 15 1/2 knots, (d) failed to produce a ship of high enough classification and rating, (e) failed to clean the boilers chemically, (f) wrongly assumed that the boilers had been properly protected up to the time of conversion, (g) failed to use distilled water in its preliminary running of the boilers, (h) improperly connected the [390 U.S. 414, 440] piping, (i) installed incorrect baffle plates, (j) failed to clean the boilers adequately when performing the repair work, (k) failed to install the ventilating system properly, (l) installed an inadequate and inappropriate evaporator, (m) failed to put the feed water regulator and the feed pump governor into proper working order, (n) failed to install a boiler compound injector pump, (o) failed to provide equipment for coping with the excessive oxygen content of the water in the system, and (p) was responsible for

deficiencies in the electrical system. In addition, the Committee stated that M-S was improperly claiming for repair work done under its guarantee obligation, and that M-S had included claims for work done as to which no amount had ever been agreed upon. (10) The statement by the SEC supporting the Committee's specification of objections. The SEC, while not necessarily agreeing with all the allegations and contentions of the Committee, felt that the Committee had demonstrated that M-S should be required to prove its claims at a judicial hearing. In addition to these matters of record, respondent refers to several matters not in the record, which are said to support the propriety of accepting the compromises. Matters not in the record and not properly the subject of judicial notice cannot form the basis of judicial confirmation of a plan of reorganization. They are equally unavailing on review.

[Footnote 20] Further on the subject of valuation, see 2 J. Bonbright, Valuation of Property 880-881 (1937); 6A Collier, Bankruptcy □□ 10.13 and 11.05 (14th ed. 1965); H. Guthmann & H. Dougall, Corporate Financial Policy 656-657 (4th ed. 1962). See also Frank, Epithetical Jurisprudence and the Work of the Securities and Exchange Commission in the Administration of Chapter X of the Bankruptcy Act, 18 N. Y. U. L. Q. Rev. 317, 342, n. 68 (1941): "Value is the present worth of future anticipated earnings. It is not directly dependent on past earnings; these latter are important only as a guide in the prediction of future earnings."

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE FORTAS join, dissenting.

In my opinion, the only question which could be thought even remotely to justify the presence of this case in this Court is whether the trustee, by virtue of his office, was as a matter of law disqualified from being selected as president of the reorganized company. The Court, however, does not decide that question. The review of the massive record in these reorganization proceedings, which have been in the courts for over 10 years and on six occasions before the Court of Appeals at various stages, is not in my view an appropriate task for this Court. Believing that this decision bodes little but further delay in bringing this protracted proceeding to a conclusion, I feel justified in voting to dismiss the writ as improvidently granted, despite the fact that the case was brought here on an unrestricted writ. Since

the Court does not reach the "disqualification" issue, I consider it inappropriate for me, as an individual Justice, to express my own views upon it. [390 U.S. 414, 455]